



Thiong'o ((Suing & sued in her capacity as the administrator of the Estate of the Late Dedan Thiong'o Kingangi (Deceased)) v Thube (Environment & Land Case 1186 of 2015) [2024] KEELC 3287 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 3287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1186 OF 2015**

**OA ANGOTE, J
MARCH 7, 2024**

BETWEEN

**JANE WANJIRU THIONG'O PLAINTIFF
(SUING & SUED IN HER CAPACITY AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE DEDAN THIONG'O KINGANGI (DECEASED))**

AND

SAMUEL KIMANI THUBE DEFENDANT

JUDGMENT

1. Vide an Amended Complaint dated 9th October, 2017, the Plaintiff seeks the following reliefs as against the Defendant;
 - i. A declaration that the Estate of the deceased is the lawful exclusive owner of plot Dagoretti/Uthiru L.R Number 988 situate in Dagoretti.
 - ii. An injunction does issue against the Defendant from trespassing, alienating, damaging and/or continuing construction in the deceased parcel of land known as Dagoretti/Uthiru L.R No 988 situate in Dagoretti.
 - iii. Costs and Interests.
2. It is the Plaintiff's case that the late Dedan Thiong'o Kingangi(Deceased) is the sole registered proprietor of all that parcel of land known as Dagoretti/Uthiru L.R No 988 situate in Dagoretti (hereinafter the suit property); that the Defendant has trespassed into the said land and intends to construct thereon interfering with the deceased's Estate ownership and quiet possession and that upon discovering the said trespass, he attempted to amicably resolve the dispute with the involvement of the police and the provincial administration to no avail.



3. In response, the Defendant filed an Amended Defence and Counterclaim in which he denied the assertions as set out in the Plaintiff stating that he has an interest in the suit property being a bona fide purchaser for value without notice of any defect; that the Plaintiff is aware of his interest aforesaid as he has been in possession of the suit property since 1992 and that there have been previous proceedings between them being Nairobi HCSC 676 of 2006 where he was the 7th protester and that the suit should be struck out for being res judicata.
4. It is the Defendant's case that he entered into an agreement with the deceased to purchase ¼ acre subdivided out of the parcel of land known as Dagoretti/Uthiru L.R No 222 for a consideration of Kshs 130,000; that the Land Control Board declined to approve the sub-division of the land into a quarter acres and only allowed sub-division into half acres and that based on the foregoing, the deceased agreed to sell him a ½ acre of Dagoretti/Uthiru L.R No 222 for a consideration of Kshs 260,000 which was approved by the Land Control Board on the 3rd February, 1993.
5. According to the Defendant, after he purchased the property, the deceased gave him a written consent allowing him to occupy the land and he has been thereon since August, 1992; that he paid the full purchase price in two installments being Kshs 40,000 and 2, 200 Sterling pounds which was duly acknowledged by the deceased and that the deceased nevertheless refused to sign the transfer forms to effect the transfer of the property.
6. According to the Defendant, he instituted HCCC No 5347 of 1993 seeking specific performance but the deceased passed on before conclusion of the case; that the family of the deceased thereafter instituted succession proceedings in Nairobi Succession Cause No 676 of 2006 and that there is a Court order in Succession Cause No 676 of 2006 appropriating the entire parcel of land to await obtaining of decrees by the relevant protesters including the Defendant.
7. In the Counterclaim, the Defendant seeks for the following orders:
 - i. A declaration that the parcel of land known as Dagoretti/Uthiru LR No. 988 is the lawful property of the Defendant Samuel Kimani Thube.
 - ii. An injunction against the Plaintiff stopping her, her personal representatives, heirs or agents and her co-administrator(s) in the Estate of the Late Dedan Thiong'o Kingangi, from evicting the Defendant from the parcel of land known as Dagoretti/Uthiru L.R No. 988.
 - iii. An order directing that the parcel of land known as Dagoretti/Uthiru L.R. No. 988 be registered in the full name of the Defendant Samuel Kimani Thube.
 - iv. Costs and interest of this suit.
 - v. Any other orders that this Honourable Court may deem fit and just in the circumstances of this suit.

Hearing and Evidence

8. The matter proceeded for hearing on 22nd February, 2022. The Plaintiff, PW1, adopted her witness statement dated 1st October, 2021 as her evidence in chief and produced the bundle of documents dated 19th October, 2021 as PEXHB1.
9. In brief, it was her testimony that she is the Administrator of the Estate of the Late Dedan Thiong'o Kingangi, the registered proprietor of the suit property; that the Defendant trespassed onto the property in 2015; that she had never met the Defendant before his trespass; that she has been an



- Administrator of the Estate since 2007 and that the Police and provincial administration have refused to stop the trespass.
10. It was her evidence on cross-examination that by the time she filed the suit, her co-Administrators were alive and gave her consent to do so; that she has not adduced the aforesaid consent; that she was in the USA in 2004 but came to the country to attend her fathers' funeral; that the larger parcel 222 belonged to her grandfather who divided it among his children, including her father, and that she did not participate in the sub-division of the property.
 11. It was the evidence of PW1 that she was not in the country in 1992 at the time of the alleged Sale Agreements; that she has been in the country since 2005 and by 2007, the land was vacant and that she had access to one of her father's bank accounts but was not sure of which of the cheques for the sale were banked into the account.
 12. It was the evidence of PW1 that she was not aware of case no 5347 of 1993; that they filed the succession case in 2006 where several parties including the Defendant were protesters on the ground that they had purchased the property from her father and that the distribution of the property was stopped by the Succession court pending the determination of this suit.
 13. During re-examination, PW1 stated that she was not a party to the Sale Agreement and cannot authenticate it; that she is not a document expert; that she first saw the documents when the Defendant protested in the succession court; that she was in the country between 2005 and 2015 during which time the Defendant was not on the property and that by the time her father died, the property was in the name of the Administrators and he could not have sold it.
 14. PW2 was Melvin Esakine Papa, a retired Chief Inspector of Police trained in forensic document examination. It was his evidence that he has 24 years' experience in the field of forensic document examination; that he is the founder of Spectoral Forensic Services based in Nairobi, a registered business name offering forensic services and that upon instructions by the Plaintiff's Advocates, he examined several documents.
 15. According to PW2, the documents he examined included the typed Sale Agreement between Dedan Thiong'o and the Defendant dated 11th March, 1992; the handwritten letter from Dedan Thiong'o to the Defendant dated 12th March, 1992 and the Mutation Form for Title No Dagoretti/Uthiru/222 dated 17th December, 1992.
 16. The other documents that PW2 examined included the Bankers Cheque Serial No 019664 received by Dedan Thiong'o on 11th March, 1992; the acknowledgement of receipt of cheque dated 18th January, 2000 all of which constituted questioned signatures vis a visa copy of the Identity Card No 5696682 issued to Dedan Thiongo on 7th August, 2008 which constituted the known signature.
 17. It was his evidence that he was requested to ascertain the signatures of the deceased, compared to his known signatures and he concluded that the signatures were not the same. It was his evidence that he prepared a detailed report regarding the same dated 10th September, 2021 which he produced as PEXHB 2.
 18. In cross-examination, PW2 stated that he was supplied with the documents by the Plaintiff's Advocate; that all the documents were copies whereas it is best practice to deal with originals; that working with a photocopy is limiting and if it is not clear, ink analysis and variations cannot be carried out; that he did not carry out ink analysis; that he knows Mr Kenga who is his Senior in the profession and that if Mr Kenga conducted an ink analysis, it can account for the difference in opinion.



19. PW2 stated that the known signature was from the ID which was issued almost 10 years after the questioned signatures; that there is usual minimal variation within 10 years; that every signature has its own purpose but some people retain the same signature; that ink analysis is not the only method to establish similarities and that if you have clear copies, you can come up with a reliable report.
20. The Defendant, DW1, adopted his statement dated 4th January, 2016 as his evidence in chief. He produced the bundle of documents dated 4th January, 2016, 13th January, 2022 and 31st May, 2022 as DEXHB 1, 2 and 3 respectively.
21. It was his evidence that he entered into an agreement with the deceased; that the deceased died in 2004; that they did not complete the Agreement because he was in America; that he had paid the whole amount and the delay to transfer was on the part of the deceased; that they went to the board which granted them the consent; that the original parcel was Dagoretti/Uthiru/222 and after sub-division, he was entitled to parcel 988 and that he took possession of the property in August, 1992 with the approval of the deceased given in writing.
22. DW1 testified that he developed the suit property in 1993; that he has 30 rental houses on the land with water and electricity; that he filed a suit against the deceased being case no 5347 of 1993; that the deceased had filed a Defence in HCCC 5347 of 1993; that he died before the case was completed and that he sued the deceased because he had refused to transfer the property.
23. DW1 stated on cross-examination that the vendor's signature was not witnessed in the agreement dated 11th March, 1992; that there is no indication that any of their signatures is witnessed in the agreement of 12th March, 1992; that the deceased was alive when he signed the Agreement and that there was another agreement between him and the deceased which is witnessed.
24. According to DW1, by the time he went to the land control board, the deceased had been allocated parcel number 988 by his brothers; that the mutations had been done by them; that the agreement of 12th March, 1992 makes reference to plot 988 whereas the mutation was done on 8th January, 1993 and that Dedan Thiong'o was working with surveys at the time and the surveyor must have given him the sub-division on 12th March, 1992.
25. It was the testimony of DW1 that when they entered into the first agreement, the document had no mutation; that the letter of 12th March, 1993 clarifies how the terms of the agreement changed; that he knew Dedan was not the owner of the land but was one of the administrators and when he obtained the LCB consent and that Dedan Thiong'o has never disputed his documents.
26. In re-examination, DW1 stated that there are three agreements being the LSK agreement and the agreements dated 11th and 12th March, 1992; that the LSK agreement is in the bundle because of the allegations of forgery in the latter two agreements; that he had to get a document with Dedan Thiong'o's original signature and that the agreement was discarded because he had not gone to the land by the time he signed it.
27. DW1 testified that the land had not yet been sub-divided and had buildings thereon when they commenced negotiations; that when he discovered that the portion he was to buy had no buildings, they changed the acreage and the price and that the agreement of 11th March, 1992 was signed before the anticipated completion date in the LSK agreement being 1st July, 1992.
28. It was his further evidence on re-examination that Dedan Thiong'o acknowledged payment of Kshs 40,000 which was paid through a cheque dated 2nd March, 1992; that the agreement changed because he purchased ½ an acre instead of ¼ an acre due to the City Council and Land Control Boards' refusal



- to grant approval for purchase of an ¼ an acre and that Dedan Thiong'o was present when he took over the property in 1992 and did not have any objection.
29. DW2 was Emmanuel Karissa Kenga, a retired Commissioner of Police and a qualified forensic document examiner. It was his evidence that he received a request from the Defendant's Advocates to examine documents; that he examined A1-A5 and B1-B5 which showed similarities leading to his conclusion that they were signed by the same person.
 30. It was his further evidence that he has seen the report by PW2 who was his student but never completed his studies; that PW2 is not a document examiner; that the documents PW2 worked on are copies which are not clear and legible and that he wondered how PW2 came to his conclusion.
 31. It was DW2's evidence on cross-examination that he examined documents A1-A5 and B1-B2; that B1 and B2 is the LSK Conditions of Sale and an application for consent of the board respectively; that the documents were given to him by the Advocates and that he treated the two documents as known signatures of the deceased and compared them with questioned documents.
 32. DW3 was Joseph Gitau Karanja, a farmer. He adopted his witness statement dated 13th January, 2022. It was his evidence that in the years 2003-2008, he worked as a Chief in Uthiru-Ruthimitu location and the suit property fell within his administrative jurisdiction and that two ladies, Jane Thiong'o and Jane Wanjiru went to his office complaining about the Defendant claiming that he had trespassed on their property.
 33. It was the evidence of DW3 that he knew the deceased during his lifetime and knew that he was a friend of the Defendant; that at the time of Dedan Thiong'o's death, he was still the Chief; that the Defendant went to him seeking assistance in respect of tenants who were on the suit property; that the land was developed by the Defendant and that the photos show the actual position on the ground.

Submissions

34. The Plaintiff, through Counsel, submitted that the Defendants' Counterclaim runs contra to Section 7 of the Civil Procedure Act which provides for the principle of res judicata on account of the High Court Civil Suit 5347 of 1993; that in the aforesaid matter, the Defendant sued Dedan Thiong'o (deceased) seeking enforcement of the land transaction between himself and the deceased; that the issues raised in the Counterclaim, including the evidence produced by the Defendant, have already been dealt with by the High court in the said matter and that the parties herein are also the same parties in the said suit.
35. Counsel submitted that the agreement of 11th March, 1992, was invalid not having been duly attested as per the provisions of Section 3(3) of the Law of Contract Act and that the letter dated 12th March 1992 which the Defendant alleges revised the agreement dated 11th March 1992 equally falls short of the requirements of Section 3(3) of the Law of Contract Act.
36. It was submitted that the LCB consent dated 3rd February 1993 was fraudulent as the deceased was not the registered owner of the suit property, which property was in itself not yet in existence being within the mother title.
37. The Defendant's Counsel submitted that the evidence adduced proves that the Defendant has been rightfully on the suit property since 1992 as a bona fide purchaser for value and that all the elements of a valid sale were proved, to wit, the agreement, payments of the purchase price, and the LCB consent.
38. It was submitted that the Agreements were in clear precise terms, duly signed by the deceased and payments duly made making them unassailable; that as regards the conflicting expert evidence adduced, the Court of Appeal, when faced by a similar situation in Amosam Builders Developers Ltd vs Betty



Ngendo Gachie & 2 Others [2009] eKLR laid out the general rule being that the Court is not bound by expert evidence and may reject it depending on the circumstances of the case and that the Court went further to state that in instances of conflict, the Court has to come to a decision one way or the other.

39. Counsel stated that the undated agreement is not in issue; that the Agreements of 11th and 12th March, 1992 came before the requirement of attestation which was introduced into the Law of Contract Act vide the Statute Law (Miscellaneous Amendments) Act, No. 2 of 2002 and that the agreements are therefore binding.
40. It was submitted that if indeed the Defendant's Counterclaim is statute barred, then the Plaintiffs suit is equally statute barred because the Defendant took possession of the suit property in 1992 while the suit herein was filed in 2015 past the statutory period of 12 years and that the Defendant's claim for specific performance is well founded and the specific circumstances of the matter deserve the application of the doctrine of equitable intervention to avert injustice and unfairness.

Analysis & Determination

41. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
- i. Whether the Plaintiff's Claim, and Defendant's Counterclaim are competent?
 - ii. Whether Dedan Thiong'o entered into the Sale Agreements dated 11th & 12th March, 1992 for the sale of the suit property?
 - iii. Whether there was a valid Sale Agreement between Dedan Thiong'o and the Defendant?
 - iv. Whether the Defendant is a bonafide purchaser for value?
 - v. What are the appropriate reliefs to issue?
42. At the onset, it is noted that both the Plaintiff and Defendant have raised objections touching on the competence of each other's respective claims. Their objections are two fold to wit, that the Plaint and Counterclaim are statute barred and/or res judicata.
43. The Limitation of Actions Act prescribes the limitation period for the institution of suits for various causes of action. The rationale for the statute of limitations was aptly captured by the East African Court of Justice in Attorney General of Uganda & Another vs. Omar Awadh & 6 Others [2013]eKLR where it was stated as follows;
- “Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations...is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future).”
44. The Defendant contends that the Plaintiffs' claim, being based on an action for recovery of land is time barred. He asserts that he took possession of the suit property in 1992 whereas the suit was filed in 2015



and that by virtue thereof, the period for the recovery of land as set out in Section 7 of the Limitation of Actions Act has been extinguished. The said section provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first occurred to some person through whom he claims, to that person.”

45. The Defendant bases his claim on the fact that he has been in possession of the suit property for a period of more than 12 years before the filing of the suit by the Plaintiff. This is in essence a claim for adverse possession. However, the Defendant does not vide his Counterclaim seek for an order of adverse possession but purchaser’s interest. That being the case, the Defendant’s plea fails.

46. On her part, the Plaintiff claims that the Counterclaim which is based on the Sale Agreements of 11th and 12th March, 1992 is statute barred by virtue of Section 4(1) (a) of the Limitation of Actions Act. The said Section provides as follows:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

a. Actions founded on contract.”

47. From the material placed before the Court, it is apparent that the basis of the Defendant’s claim is the contract dated 12th March, 1992 with its anticipated completion being sometime in the year 1993. The Counterclaim having been filed in 2018, it has been argued that the same has been brought about 24 years after the cause of action accrued.

48. On the other hand, under Section 7 of the said Act, the Defendant would have had twelve (12) years to recover the land from the Plaintiff from the time his right accrued thereon. Considering that the Defendant is claiming purchaser’s interest, his rights accrued at the time of the anticipated completion date being sometime in 1993.

49. It is noted that the Defendant had filed a suit sometime in 1993 seeking to assert his rights over the suit property. It is unclear how long the suit was active before its eventual dismissal for want of prosecution. However, what is clear is that the filing of HCCC No. 5347 of 1993 stopped time from running. Indeed, the filing of objector proceedings in High Court Succession Case number 676 of 2006 also stopped time from running. That being so, there is no evidence to show that the Defendant’s counter claim is time barred.

50. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

51. In the case of John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021)



(Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata as follows:

“This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:”

Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights...The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.⁵⁶The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

“.....whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision...”

52. The Defendant contends that the Plaintiff is res judicata, HCSC No 676 of 2006. He asserts that the Court in the succession cause appropriated the entire parcel of land known as Dagoretti/Uthuru 222 and the sub-divisions thereof including the suit property to await the obtaining of decrees by the relevant protestors in the succession cause.
53. To begin with, the succession cause was with respect to the distribution of the Estate of Dedan Thiong’o. While the suit property is the subject of both proceedings, the issue here is the proprietorship of the suit property and not distribution of the Estate. Further, and contrary to the Defendants’



- assertions, no determination, and rightfully so, was made on the question of the proprietorship of the suit property. The court stayed the summons for confirmation in relation to Dagoretti/ Uthiru/222 (the mother title) pending the hearing and determination of this suit.
54. On her part, the Plaintiff contends that the Counterclaim is res judicata HCCC No 5347 of 1993. The Court has considered the pleadings adduced in respect of HCCC No 5347 of 1993. In it, the Defendant, as the Plaintiff, sued the deceased claiming specific performance of the Agreements dated the 11th & 12 March, 1992.
 55. However, there is no evidence that the matter proceeded beyond the pleadings. DW1's evidence was that he essentially abandoned the suit. Ultimately, the Court finds that the matter was not heard and determined, a prerequisite for invocation of the doctrine of res-judicata.
 56. The dispute herein turns on the issue of ownership of the suit property. It is the Plaintiff's case that the suit property belongs to the Estate of the deceased, Dedan Thiong'o, who is its sole registered proprietor and that the Defendant has trespassed onto the property interfering with the Estates' ownership thereof.
 57. The Plaintiff adduced into evidence a copy of the grant in respect of the Estate of Dedan Thiong'o, a copy of the search with respect to the suit property dated 27th July, 2005, photographs of the suit property, forensic examination report dated 10th September, 2021 and the document examiner's report.
 58. On his part, the Defendant asserts that he is the rightful proprietor of the suit property. He contends that the late Dedan Thiong'o sold to him the suit property, being ½ a portion of Dagoretti/Uthiru/222 and that he duly paid the purchase price and was granted possession of the property.
 59. He adduced into evidence the Sale Agreement dated 11th March, 1992; the letter dated 12th March, 1992, the court order in HCSC 676 of 2006 dated 30th July, 2013; the LCB consent dated 3rd February, 1993; mutation form for Dagoretti/Uthiru/222 dated 17th February, 1992, approved subdivision plan for Dagoretti/Uthiru/222, copies of cheques for Kshs 40,000 and 2,200 sterling pounds, acknowledgements in respect thereof, pleadings in HCCC 5347/93, objector pleadings in HCSC 676 of 2006, and a forensic report dated 18th November, 2021.
 60. The Defendant claims a purchaser's interest in the suit property while the Plaintiff maintains ownership of the suit property by virtue of being the registered proprietor thereof. The Plaintiff states that the deceased did not enter into an agreement with the Plaintiff and in any event, any alleged sale of the suit property is void.
 61. In determining the parties' cases, the Court remains alive to the principle that he who alleges must prove and each party is therefore obligated to prove his case on the required standard of proof being on a balance of probabilities. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:
 - “(1) Whoever desires any 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
 62. And Sections 109 and 112 of the same Act states as follows:

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“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

63. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

64. As aforesaid, the Plaintiff maintains that the deceased did not sign the Sale Agreements. She has, through PW2, Martin E Papa, a forensic examiner adduced a report indicating that the deceased did not sign the Agreements. On the other hand, DW2, Emmanuel Kenga, a forensic examiner adduced a report indicating that the Agreements were signed by the deceased.

65. In *Teresia Kamene King'oo vs Harun Edward Mwangi* [2019] eKLR, the Court of Appeal reiterated that the Court is not bound by expert evidence. The Court stated as follows:

“In *Stephen Kinini Wang'ondu vs The Ark Limited* [2016] eKLR, it was stated that expert evidence does not “trump all other evidence”. A judge is not bound by expert evidence. The weight and probative value to be given to expert opinion is a matter of discretion for the trial court. Where there is conflicting expert opinion, a judge should test it against all other evidence.”

66. The Court has considered the evidence in this respect. As regards credentials, DW2 testified that PW2 is not a certified examiner. This allegation was however not proved. Both PW2 and DW2 gave testimony as to their methodology in undertaking the document examination. It was revealed in evidence that DW2 relied on original documents while PW2 relied on copies which he admitted limited the examination he undertook.

67. DW2 further stated that he did carry out ink analysis, which exercise was not performed by his counterpart, PW2. The Court has also looked at the copies adduced and relied on by PW2 and finds their clarity wanting. Further, DW2 used the known signature of the deceased that had been done around the same time the disputed signatures were done. However, PW2 used the signature on the copy of the deceased's national identity card which was issued more than eight years after the alleged agreements had been signed. Having looked at the totality of the evidence, the testimony and report of DW2 is more believable than that of PW2.



68. It was the testimony of PW1 that she was not in the country at the time the agreement was allegedly signed and admittedly, could not speak to its existence or non-existence. Ultimately, the Defendant has proved on a balance of probabilities that the deceased entered into the agreements of 11th and 12th March, 1992 with the Defendant for the sale of the suit property.
69. In discussing the validity of the Sale Agreements, the first port of call is a determination of whether the deceased had the requisite capacity to enter into the agreement in issue. The Court has keenly considered the evidence in this respect.
70. It is undisputed that the deceased was entitled to a portion of L.R Dagoretti/Uthiru/222 by virtue of an inheritance from the Estate of John King'angi. He was a beneficiary of the Estate and was an Administrator of the Estate of John Kingang'i.
71. While it is not disputed that the deceased was an Administrator of the Estate of John Kingang'i, it is claimed that at the time of the sale, the succession proceedings had not been concluded and the entire mother title was still in the name of John Kingang'i.
72. Despite the assertions aforesaid, no evidence has been led as to when the deceased obtained the grant in respect of the Estate of John Kingang'i and when the Estate was actually distributed to the beneficiaries, including the deceased.
73. However, the copy of the official search adduced shows that the property was registered in the names of the Administrators, among them the deceased on 16th November, 1994. It is apparent that at the time the deceased entered into the two agreements in 1992 for the purchase of a portion of Dagoretti/Uthiru/222, the property was not registered in his sole name. Therefore, the deceased could not purport to sell the same.
74. In fact, the official search dated 27th July, 2005 shows that as at that date, parcel number 988 which was a sub division of Dagoretti/Uthiru/222 was still registered in the names of the three administrators of the Estate of the late John Kingangi.
75. The powers of administrators in dealing with the deceased's Estate is found in Sections 79 of the [Law of Succession Act](#) as read together with sections 82 and 83 of the Act. Once the assets of a deceased are vested in the administrators, the administrators are entitled to exercise the powers conferred upon them by section 82. In particular, Section 82(b) provides as follows:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best.

Provided that—

any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and (ii) no immovable property shall be sold before confirmation of the grant...”



76. Looking at the agreements, nowhere is it indicated that the deceased was selling the suit property in the execution of his duties as an Administrator of the Estate. The Court in the case of *In re Estate of Omar Makokha Matsakhu (Deceased)* [2021]eKLR, stated thus;

“Section 79 of the *Law of Succession Act* vests the estate of the deceased in the administrator. That means that he steps into the shoes of the dead owner of the property, and is able to exercise powers and duties over the property that could only be exercised by the dead owner. The vesting of the assets in the administrator is only meant to facilitate and ease the exercise of administration. The vesting constitutes the administrator legal owner of the property. However, that ownership is not absolute, for the administrator is only but a trustee. The property does not belong to him absolutely, it is estate property that comes to him for the sole purpose of administration, with a view to settle any debts and liabilities, and to distribute the net estate to heirs, beneficiaries, dependants and survivors. An administrator who acts contrary to his trusteeship breaches the trust and exposes himself to liability.”

77. Further, the evidence shows that the deceased was not the sole Administrator of the Estate of John Kingang’i. Despite this, there is no evidence to show that any of the co-Administrators consented to the sale of the suit property. The Court in *James Nganga Karanja vs Grace Mukami Ndung’u & Another* [2020] eKLR, found the sale of property made in the absence of consent from a co-administrator is void.

78. The deceased’s actions with respect to the sale of the suit property were tantamount to intermeddling. Having found that the deceased did not have the capacity to sale the suit property to the Defendant in 1992, the Court need not venture into the other objections by the Plaintiff.

79. Although the Plaintiff has sought for a declaration that the Estate of the deceased is the lawful exclusive owner of plot Dagoretti/Uthiru 988, there is no evidence to show that indeed that is the position. As already stated, the deceased was just one of the administrators of the Estate of John Kingang’i.

80. It is not clear to this court if that Estate was distributed. That being the case, it is only the succession court that can issue the declaration sought by the Plaintiff in respect of the Estates of the two deceased persons herein, that is John Kingang’i and Dedan Thiong’o King’ang’i. However, the Plaintiff is entitled to an order of permanent injunction as against the Defendant.

81. For those reasons, the Court makes the following final determination;

- a. An injunction is hereby issued against the Defendant from trespassing, alienating, damaging and/or continuing construction on parcel of land known as Dagoretti/Uthiru 988 situate in Dagoretti.
- b. The issue of ownership or distribution of Dagoretti/Uthiru 988 to be determined by the High Court, Family Division, to the exclusion of the Defendant.
- c. The Defendants Counterclaim be and is hereby dismissed.
- d. The Defendant to pay the costs of the suit and the counter claim.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 7TH DAY OF MARCH, 2024.

O. A. ANGOTE

JUDGE



In the presence of;

Ms Maini for Plaintiff

Ms Kimani holding brief for Njenga for Defendant

Court Assistant - Tracy

