



**Muli v Munini (Environment & Land Case 436 of 2017)
[2024] KEELC 6328 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 436 OF 2017
A NYUKURI, J
SEPTEMBER 25, 2024**

BETWEEN

JULIANA MBULA MULI PLAINTIFF

AND

EDNA MUNINI DEFENDANT

JUDGMENT

1. In an uncanny analogy to what is narrated in the book of 1st Kings 3:16-28 where two ladies appearing before King Solomon lay claim over the living child, before this court are two ladies claiming one property and relying on fundamentally similar facts, events and documents. In this case, Juliana Mbula Muli sued Edna Munini claiming ownership of the parcel of land measuring one acre, part of the parcel of land known as Donyo Sabuk/Komarock Block 1/600 (hereinafter referred to as the suit property).
2. Each of the parties in this suit has two sets of handwritten land sale agreements which are dated the 30th December 2004 and 23rd April 2005 respectively. In both parties' agreements, the vendor is the same, namely Simon Mwangangi Mutuku and the amounts indicated to have paid therein on the stated dates are the same. Notably, the wordings in the two agreements are similar in material and fundamental aspects, the only major difference being that in the plaintiff's agreements, she is stated as being the purchaser, while in the defendant's agreements, the purchaser is stated to be David Muindi Muli. Regarding the house that had been on the suit property, both parties claim to have built it by contracting one Joseph Nzomo Mukumbu.
3. Since the suit property is one, the two sets of agreements cannot both be valid and it follows that only one set of the agreements can be valid. In view of the above, my duty in this dispute is to ascertain whether the plaintiff has proved her claim on a balance of probability and or preponderance of the evidence.



4. In a plaint dated 2nd November 2017 and amended on 5th August 2019, the plaintiff sought against the defendant the following orders;
 - a. A permanent injunction restraining the defendant by herself, her servants and/or agents from entering and dealing with the suit property Land/Plot No. 600 Komarock Ranch now Land Parcel No. Donyo Sabuk/Komarock Block 1/600.
 - b. General damages.
 - c. Costs and interests of the suit.
 - d. A declaration that it is the plaintiff herein Juliana Mbula Muli who bought the suit property herein being Plot No. 600 Komarock Ranch now Land Parcel No. Donyo Sabuk/Komarock Block 1/600 and thus the same should be registered in her name.
 - e. A declaration that the purported sale of a portion of land Parcel No. Donyo Sabuk/Komarock Block 1/600 measuring 210 ft by 210 ft to Aume Next Frontier Investment Limited is null and void.
5. The plaintiff averred that she was the owner of a house and or land described as Plot No. 600 Komarock Ranch, now Parcel No. Donyo Sabuk/Komarock Block 1/600 situated in Matungulu Machakos County. She further stated that on 16th July 2016 the defendant trespassed on the suit property and took away building roofing materials and windows, steel doors, building stones and wire. She further alleged that on 1st July 2016, the defendant sold a portion of the suit property to Aume Next Frontier Investment Limited, on the pretext that the suit property was part of the estate of their husband one David Muindi Muli and unlawfully and unilaterally obtained letters of administration intestate in respect of the estate of David Muindi Muli knowing that the plaintiff was her cowife. She averred that she reported the matter to the chief, District Officer and the police.
6. The defendant opposed the suit and filed a statement of defence dated 24th September 2018. She denied the plaintiff's claim and stated that the suit property and developments thereon were her properties. She further averred that the plaintiff filed Criminal Case Number 672 of 2016 against Justus Muindi, Dennis Muindi and Albanus Muema claiming that the three maliciously damaged her property and stole her building materials, but that the three were acquitted as they had no case to answer.
7. The defendant admitted that the dispute was reported to the chief, the District Officer and the police and stated that the said Government officials heard the matter, and upon investigation established that the suit property belonged to the defendant.
8. The suit was heard by way of viva voce evidence. The plaintiff presented three witnesses while the defendant presented two witnesses.

Plaintiff's evidence

9. PW1 was Juliana Mbula Muli, the plaintiff in this case. She adopted the contents of her further statement dated 5th August 2019 as her evidence in chief and produced documents attached to her list of documents filed. It was her testimony that she was married to David Muindi Muli just like the defendant. She stated further that on 30th December 2004, she bought the suit property from Simon Mwangangi Mutuku and that their husband was present and a witness. According to her, the purchased property was 210 feet by 219 feet and equivalent to one acre.
10. The witness stated that she sued the defendant because the latter claimed that the suit property belonged to David their husband. She further stated that she had put up a house on the suit property



but the defendant sent people who demolished it. She also averred that when the defendant filed succession, she did not refer to the suit property as part of the estate of the deceased.

11. On cross examination, she stated that she was the defendant's co-wife and had children with their husband. She also stated that the husband had been introduced to her relatives and that they slaughtered three goats. She further stated that her father was called Stephen Muli. She also maintained that the father of her children was David Muindi Muli. She stated that the defendant interfered with the suit property upon the death of David Muindi Muli. She stated further that before KBC Police Station, she called Simon Mwangangi as her witness.
12. She claimed that she sued the people who demolished her house. She stated that when she bought the land, the balance was Kshs. 8,000/- which she paid on 23rd April 2005. She denied the defendant's claim that there was an agreement in favour of David Muli and also denied having an agreement which removed David's name replacing it with hers. She stated that she took a loan from Ukulima Cooperative Sacco and used the funds to purchase the suit property. She denied the defendant's claim that the defendant is the one who paid for the suit property and denied the claim that the defendant took a loan to purchase the suit property. She stated that one Nzomo is the one who constructed her house.
13. In reexamination, she stated that she did not call Simon Mwangangi as her witness because he was the defendant's witness and that Peter Kimeu is the one who helped her look for land to purchase.
14. PW2 was Joseph Nzomo Mukumbu. He adopted his witness statement dated 2nd November 2017 as his evidence in chief. He stated that he knew the parties in the suit as they were David Muli's wives. He stated that he built a house for the plaintiff in 2007 at a consideration of Kshs. 25,000/-.
15. In cross examination, he stated that he was not a witness when David Muli married his wives, and that he has never seen the plaintiff in David Muli's home. He stated that the defendant lives in David Muli's home but that he did not know where the plaintiff lived. He stated that he passed by the defendant's house got pegs and went to build on the suit property and that the house had a roof, and windows but it was incomplete.
16. PW3 was Peter Kimeu Kilonzo. He adopted his witness statement dated 25th June 2021 as his evidence in chief. He stated that a week before the 30th December 2004, the plaintiff had asked him to look for land to purchase and that when he got the suit property, the parties made an agreement on 30th December 2004 for sale of the suit property at Kshs. 43,000/-. He stated that the plaintiff paid Kshs. 35,000/- and that the purchased land was one acre.
17. On cross examination, he stated that he knew the defendant as the plaintiff's cowife and that from his home to the suit property, the distance was 1 kilometre. He stated that Mutune Kilonzo and Mwanza were his brothers and that when he got the land, he was with Tobias and Mwanzia and no one else. He stated that it was Tobias who wrote the agreement and that he was present when Kshs. 35,000/- was paid but that when Kshs. 8,000/- was paid, he was absent. He stated that he was a broker in the sale of the suit property. He stated that David Muli was a witness to the agreement.
18. In reexamination, he stated that on 30th December 2004, when the plaintiff was buying the suit property he was a witness and other witnesses were Tobias Muasya, Jackson Muasya and David Muli. That marked the close of the plaintiff's evidence.

Defendant's evidence

19. DW1 was Edna Munini. She adopted her witness statement filed on 16th November 2021 as her evidence in chief. She stated that she married David Muindi Muli under Kamba Customary Law



- in 1980 and that in 1984, they solemnized their marriage under the Marriage Act. That they lived together for about three decades, got children and acquired several assets and liabilities together. That they lived at Ngiiini, Mitaboni Location. She stated that she was unable to locate her marriage certificate. She averred that her husband did not marry any other spouse.
20. According to DW1, in 2004, together with her husband, they thought of having low cost housing and therefore her husband looked for land to purchase while she sought finances from a financial institution. She averred that when her husband got one acre of land at Komarock Ranch, she sought for a loan from the Cooperative Bank for a sum of Kshs. 200,000/- which was granted to her on 21st December 2004.
 21. That the husband visited the identified land on 30th December 2004 and negotiated the payment plan. That he subsequently entered into a land sale agreement to purchase the land at Kshs. 43,000/- from one Simon Mutuku. That he paid Kshs. 35,000/- in cash while they agreed for the balance to be paid in 3 months. That the sale agreement was completed on 23rd April 2005 at Komarock, when the sum of Kshs. 8,000/- was paid in cash to Simon Mutuku. She also stated that she paid Jackson Muasya and Tobias Mathenge Kshs. 10,000/- as brokerage fees.
 22. It was her testimony that the second stage was house construction and that the person recommended was Nzomo Mukumbu from their neighbourhood, as he is the same person who had constructed their matrimonial home. She stated that she was surprised that Nzomo had switched sides in favour of the plaintiff.
 23. She averred that the construction took two years from 2007. That Simon Mutuku was on site providing resources and casual labour. That payments were made in cash and no receipts were issued. That her husband was overseeing the construction. She stated that by 2010, the house was almost complete and semi-furnished save for the interiors.
 24. She stated that upon the death of her husband, she was appointed as administrator to his estate and no objection from anyone was raised. She explained that the suit property was not included in the succession cause because it was yet to be transferred to the deceased's name.
 25. She claimed that in March 2010, Simon Mutuku alerted her of a fraud attempt as the plaintiff had brought him a pre-printed sale agreement for him to sign. That the error in the handwritten agreement was the completion date which was 30th December 2005, which conflicted with the real agreement having a completion date of 23rd April 2005.
 26. She stated that in 2013 while renovating the house, her workers were accosted by the plaintiff and the chief of Lukenya Location one Titus Musyoka with the plaintiffs asserting ownership based on a decision letter dated 11th September 2013. She denied receiving any notice or correspondent concerning the said decision. She maintained that the property is in Komarock Location and not Lukenya location. That the chief of Komarock Location held a meeting on 30th May 2014 and made a decision upon listening to all the parties and considering the documents. That the plaintiff alleged to have been friends with David Muindi Muli. That the chief made a decision which was signed by all the parties.
 27. That to prevent trespass by fraudsters on the suit property, Tobias prepared a caretaker agreement so that Joseph Mwangangi Mukumbu would take temporary occupation of the suit property to keep it in good state whereof he stayed there continuously between 2014 to 2016. That the plaintiff did not take action because she was not the rightful owner.
 28. She averred that the plaintiff filed a case to the Deputy County Commissioner (DCC) whereof the DCC upheld the decision of the Chief of Komarock.



29. That she decided to deconstruct the house on 16th July 2016 which led to the plaintiff to cause trumped-up charges on 19th July 2016 for malicious damage theft and handling stolen promptly. That on 22nd May 2017, the accused were discharged on the finding that they had no case to answer. She stated that the plaintiff exaggerated the value of the house in the criminal proceedings at Kangundo Law Courts alleging that the value of the house was Kshs. 2 million when the said house was a small-sized residential development financed by low income earners and done under budget. That even the materials and goods collected at the scene together with the receipts show that the plaintiff was clueless on the house that existed.
30. She stated further that having lost her case in 2017, the plaintiff interfered with the suit property and that it emerged that by virtue of the plaintiff's extra-marital affair with David Muindi Muli, she was privy to his family's business deals, and that the conflict arose after his death. That the matter was determined by competent national Government administrators and a magistrate court. She maintained that she is the one who personally paid the balance of Kshs. 8,000/-.
31. She produced documents attached to her list of documents dated 24th September 2018 and another list of documents dated 16th November 2021. She produced a marriage affidavit; letter from the Cooperative Bank dated 16th December 2004; printed sale agreement made on 30th December 2005; letter dated 30th May from Chief of Komarock Location on arbitration; letter dated 27th August 2014 by the Matungulu DCC; proceedings in Kangundo Criminal Case No. 672 of 2016 and summons by Assistant Chief Komarock Location.
32. On cross examination, she stated that she had not produced a marriage certificate and that she gave her husband the money to pay for the suit property, and that at that time all the assets were held by her husband. She stated that her name does not feature in all the agreements. She stated that she lodged a complaint of forgery at Kangundo Police Station and that the same was forwarded to the DCI headquarters in Kiambu but that she did not have the OB number. She stated that she had no document examiner's report.
33. She stated that she filed Succession Cause No. 320 of 2013 and that on the certificate of confirmation, the suit property was not indicated. She stated that she only indicated money but not other properties. She further stated that D-Exhibit 3 which was the Chief's letter showed that she was the owner of the suit property and that it did not state that it belonged to her husband. She stated that D-Exhibit 6 showed that she sold the suit property to Aume Next Frontier Investment Ltd.
34. In reexamination, she stated that she married her husband and was married until his death in 2010 and that she still lives where she was living. Regarding the chief's letter, she stated that it was written after the death of her husband and everything he left belonged to her and their children. She stated that she sold the suit property to Aume Next Frontiers Investment Ltd on account of the Chief's letter but refunded them their money.
35. The witness stated that the certificate of confirmation was applied for by the public trustee and that there has been no objection to the succession cause. She stated that her husband had many properties including motor vehicles and the suit property was only a small part of the deceased's property as he had other pieces of land.
36. DW2 was Simon Mwangangi. He adopted his witness statement dated 16th November 2021 as his evidence in chief. His testimony was that he was the son of Mueni Mutuku, the registered proprietor of the parcel of land known as Donyo Sabuk/Komarock Block 1/600. He also stated that he was authorized to sell one acre being a portion of the said property to David Muindi Muli the defendant's late husband. That through Tobias Muthengi, he got a purchaser the late David Muindi Muli and they



agreed to sell the property at Kshs. 43,000/-. He stated that a deposit of Kshs. 35,000/- was paid to him on 30th December 2004 and he allowed David to take possession of the land. He stated that on 23rd April 2005, the defendant paid the balance of Kshs. 8,000/- at Komarock. He stated that the agreement had David Muindi Muli's name and that Jackson Muasya witnessed the transactions. He stated that the plaintiff was a stranger to her. That in 2007, he was involved in the construction of the house on the suit property and supplied materials, and casual labour.

37. He stated that in March 2010, the plaintiff tried to trick his mother into signing a drawn sale agreement by fraud and misrepresentation and that that is when he raised alarm and informed the defendant. The witness further stated that in 2014, the defendant raised a dispute over the suit property before the chief of Komarock and that upon hearing the parties, he made a decision. Further that in July 2016, the police arrested the defendant's sons on a claim that they had demolished the property. He stated that in 2012, the plaintiff destroyed the fence of the suit property and that when she was reported to police she filed this suit.
38. In cross examination, he stated that he sold the land to David Muli and that the plaintiff did not buy the suit property. He denied the signatures on the plaintiff's land sale agreement and said the same did not belong to him. He stated that although it was not the first time she was seeing the plaintiff's agreement, he did not complain about the signatures to the police. He stated that he did not know the plaintiff and that he was illiterate. Further, that he was not there when the plaintiff destroyed the fence and that he did not know if the plaintiff's house was demolished.
39. In reexamination, he stated that it was the defendant who sued him at the chief to determine the person whom he sold the land. He stated that the last payment for the land was done by the defendant as her husband had died. That marked the close of the defence case.
40. Parties filed written submissions in support of their respective cases. On record are submission filed by the plaintiff on 27th April 2023 and submissions filed by the defendant on 30th May 2023.

Plaintiff's submissions

41. Counsel for the plaintiff submitted that the plaintiff's agreements dated 30th December 2004 and 23rd April 2005 are valid and enforceable. Reliance was placed on Section 3 (3) (a) and (b) of the [Law of Contract Act](#) and Hulsbury's Laws of England 8th Edition, Re-issue Vol 9 (1) page 340 paragraph 603, and counsel submitted that the agreements produced by the plaintiff had been reduced into writing and had been attested by two witnesses and that therefore the same were enforceable.
42. On whether it was the plaintiff who purchased the suit property, counsel submitted that the three plaintiff's witnesses testified that the plaintiff purchased the suit property. Counsel argued that when the house on the suit property was demolished, it was the plaintiff who complained and not the defendant. Counsel argued that the agreements produced by the defendant did not have her name and that she did not call her witnesses Tobias and Jackson. Counsel argued that although DW2 disowned the signature on the plaintiff's agreement, he never complained to police about that issue and that DW1 did not produce the OB number in regard to her complaint to the police.
43. Counsel argued that the defendant did not file a counterclaim or plead fraud as per Order 7 Rules 3 not 7 and Order 2 Rules 4 and 10 of the Civil Procedure Rules. The court was referred to the case of *JKK v. MWK & 2 Others* [2020] eKLR for the proposition that allegations of fraud must be pleaded and strictly proved. Counsel also argued that since the suit property was not part of the assets stated in Machakos HCC P & A No. 320 of 2013 then the same did not belong to the deceased. Reliance was placed on Rule 7 (1) of the Probate and Administration Rules, for the purpose that the full inventory of a deceased person's assets and liabilities and value of both movable and immovable



assets and liabilities must be provided by a person seeking a grant. Counsel relied on the ruling of this court on the interlocutory application.

44. On whether the plaintiff is entitled to reliefs sought, reliance was placed on Article 23 and 40 of *the Constitution* and counsel argued that the plaintiff had demonstrated that she owned the suit property. On costs, the court was referred to Section 27 of the *Civil Procedure Act* for the proposition that costs follow the event.

Defendant's submissions

45. The defendant submitted that she was appearing in person and generally focused on the substantive matter rather than procedural technicalities. She argued that although the plaintiff claims that the suit property was hers, that position was opposed by the defendant who maintained that the same was her matrimonial property. On ownership, she argued that Ms. Ruth Mutuku was the registered proprietor of the suit property, having a certificate of title thereto and that under Sections 24 (a), 26 and 28 of the *Land Registration Act*, she was still the absolute and indefeasible owner subject to overriding interests.
46. On who has a justifiable claim of ownership over the suit property, reliance was placed on Article 162 (2) (b) of *the Constitution* and Section 13 of the Environment and Land Court to argue that this court has jurisdiction to handle this matter. Reliance was placed on the case of BWM v. JMC Muraya ELC Case No. 379 of 2017 [2018] eKLR and Section 17 of the *Matrimonial Property Act* for the proposition that this court has jurisdiction to hear disputes relating to matrimonial rights. The defendant also relied on the case of Gladys Muthoni Kibu v. Geoffrey Ngatia [2021] eKLR to buttress her submission in that regard.
47. On the question of marriage, the defendant submitted that according to the customs of the Kamba Community, "Ntheo" ceremony was sufficient to prove marriage. For this argument, the court was referred to the decision in In Re Estate of Stephen Kimuyu Ngeki [1998] eKLR and Eugene Cotran's explanation in his Article "Restatement of African Law", Vol. 1 : Kenya 1, the Law of Marriage and Divorce.
48. Further, reference was made to Sections 11 and 37 of the *Marriage Act* (repealed) and Sections 2, 6, 7 and 14 of the *Matrimonial Property Act* and the decision in Njoroge v. Daudi Alias Ngari [1985] for the argument that where matrimonial property is being held in the name of one person but the other spouse contributed to the acquisition of the same, then both spouses have proprietary interest therein.
49. The defendant also relied on the cases of Hubert L. Martin & 2 Others v. Margaret J. Kamau & 5 Others [2016] eKLR and Danson Kimani Gacina & Another v. Embakasi Ranching Company Ltd [2014] eKLR, for the proposition that where both the plaintiff and the defendant have similar land sale agreements over the same land, the court ought to investigate their claims. She argued that she produced evidence of obtaining a bank loan for the purchase and development of the land and that her evidence was more convincing as the chronology of events of getting the loan converge with the timelines of the first agreement in December 2004. She argued that the vendor corroborated her evidence. She argued that there was a caretaker who lived on the land and that at that time, the plaintiff was not in the picture and that it was the plaintiff who was interrupting the defendant's peaceful occupation and not *viva versa*.
50. The defendant argued that the plaintiff and her witness Kimeu gave evidence with low probative value. The defendant also submitted that the record shows that the plaintiff renounced ownership in a dispute determined by the chief of Komarock Location and that it was reported that the plaintiff had been a person of interest in a document of fraud and she was cautioned hence her sale agreement is



founded on quick sand. She relied on excerpts in the Book Clerk & Lindsell on Torts (20th) Edition on the definition of trespass.

51. The court was further referred to Articles 40, 27, 45, 48 and 159(2) of *the Constitution* and Sections 107 and 109 of the *Evidence Act*. The defendant relied on the case of *Miller v. Minister of Persons* [1947] 2 ALL ER 372 and argued that the plaintiff has not proved her case on the preponderance of evidence.

Analysis and determination

52. The court has carefully considered the pleadings, evidence and submissions. In this case, it is not disputed that the defendant is the widow of the late David Muindi Muli. However, the plaintiff's allegation that she is the widow of David Muindi Muli is disputed by the defendant. The parties herein made a great deal of whether the plaintiff was married to David Muindi Muli. However, since this court is not a probate and administration court, it will not endeavor to determine whether the plaintiff is the widow of David Muli. The Public Trustee filed Machakos HCC P & A 320 of 2013 in regard to the estate of David Muli and it appears he did not indicate the plaintiff as the widow of the deceased and if parties herein would like a determination of that question, they may raise it in that case.

53. As for this court, the issue for determination is one, namely; whose agreements lawfully purchased the suit property from Simon Mwangangi Mutuku. In this case, the fact that Simon Mwangangi Mutuku sold the suit property is not disputed. What is in dispute is who between the plaintiff and the late David Muindi Muli purchased the suit property from Simon Mwangangi Mutuku. Both parties have no title.

54. Section 107 of the *Evidence Act* places the burden of proof in a case on the claimant and 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.

55. Therefore, the burden of proof in a case is static and the same is on the plaintiff and at no point does it shift to the defendant.

56. Sections 108 and 109 of the *Evidence Act* provide for the evidential burden as follows;

Section 108 provides as follows;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 provides as follows;

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.

57. Therefore the evidential burden shifts to the party who would lose if no more evidence is adduced. In the case of *Raila Amolo Odinga & Another v. IEBC & 2 Others* [2017] eKLR, the Supreme Court stated on evidential burden as follows;

- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however "depending on the effectiveness with which he or she discharges this, the evidential burden



keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were produced.

- (133) It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...
58. This being a claim by the plaintiff for the suit property on the basis of land sale agreements dated 30th December 2004 and 23rd April 2005, and in view of the defendant's documentary evidence that the suit property was purchased by David Muindi Muli, the burden of proof in this case fully rested on the plaintiff to demonstrate that she lawfully purchased the suit property from Simon Mwangangi Mutuku and that it is her sale agreements that are genuine while those of the defendant are not genuine. In addition, the standard of proof required of the plaintiff is on a balance of probability.
59. The argument by the plaintiff that DW2 ought to have reported that his signature was forged on the plaintiff's agreement and that the defendant ought to have pleaded and proved fraud against the plaintiff does not hold water since the person who is asking for a judgment in her favour in this case, is the plaintiff and it is upon her to prove her claim and discredit the defendant's assertions.
60. Before me are two agreements produced by the plaintiff dated 30th December 2004 and 23rd April 2005 respectively. The agreement of 30th December 2004 is alleged to be the first agreement stating that the consideration for the land is Kshs. 43,000/- and that a sum of Kshs. 35,000/- had been paid. The agreement stated that the balance of Kshs. 8,000/- was to be paid in the month of March. The second agreement dated 23rd April 2005 was for payment of Kshs. 8,000/-.
61. Interestingly, the defendant also has two agreements. One dated 30th December 2004 and another dated 23rd April 2005. In the agreements, the vendor is Simon M. Mutuku and the purchaser is David Muindi Muli. Just like the plaintiff's agreement, the agreement of 30th December 2004 is for payment of deposit of Kshs. 35,000/- and an averment that the balance of Kshs. 8,000/- will be paid by the month of March. The agreement of 23rd April 2005 is for payment of Kshs. 8,000/-. The wordings in the two respective agreements mirror each other and it is clear that one set of agreements was copied from another because in my view, random agreements between different purchasers cannot be similarly worded.
62. As the agreements are similar in dates, contents, the manner of wording, the considerations paid and the witnesses who signed them, having considered the evidence of the plaintiff, it is my view that the plaintiff did not adduce any evidence to discredit the authenticity of the defendant's agreements dated 30th December 2004 and 23rd April 2005. She did not present evidence of a document examiner to confirm that the signatures of those who allegedly signed the defendant's agreements were not genuine.
63. Besides, DW2 Simon Mwangangi Mutuku testified in favour of the defendant and maintained that he sold the suit property to David Muindi Muli and that the last instalment of Kshs. 8,000/- was paid by the defendant personally. This witness disowned the plaintiff's sale agreement and the plaintiff did not provide any other evidence to rebut this evidence. No evidence of document examiner was presented by the plaintiff to disapprove DW2's evidence. The plaintiff having failed to demonstrate that the evidence



of DW2 was unreliable, it means that indeed it is true that the late David Muindi Muli is the one who purchased the suit property, and therefore his agreements are genuine.

64. While the defendant in her witness statement and list of documents stated that the source of the funds that were used to purchase the suit property was a loan from the Cooperative Bank and produced a letter from that bank dated 16th December 2004 to that effect, the plaintiff's witness statement which was filed after the defendant's statement was silent on the source of funds. However, when that issue was raised in cross examination, the plaintiff stated that the source of the funds used to purchase the suit property was Ukulima Cooperative. However, no documentary evidence was produced in court to support this allegation. Therefore, I find that the defendant's evidence was more convincing and believable than the plaintiff's.
65. Although the parties raised the issue of who constructed the house on the suit property, in my view, that was a non issue in this matter as construction of the house could not confer ownership. The plaintiff also argued that as the suit property was not included in the certificate of confirmation, then the same did not belong to the estate of the deceased. My view regarding that argument is that succession proceedings are concerned with distribution of a deceased person's estate and not for ascertaining ownership. Omitting or including an asset in a list of distribution of deceased person's estate cannot confer ownership. Lawful ownership is anchored on proof of lawful acquisition as provided for in Article 40 (1) and (6) of *the Constitution* of Kenya 2010. The Probate and Administration court does not have jurisdiction to determine ownership of property as provided in law and in this case, there is nothing in the certificate of confirmation before court to show determination of ownership. In any event, the succession cause was filed by the public trustee and not the defendant and only referred to monies in the bank.
66. In the premises and for the reasons given above, it is clear that the plaintiff failed to prove her case on the required standard. I therefore find no merit in the plaintiff's case and I hereby dismiss the same with costs to the defendant.
67. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mr. Mukula for plaintiff

No appearance for defendant

Court assistant – Abdisalam

