



Basweti v Ogweri (Suing on Behalf of the Estate of Ogweri Nyarwaba - Deceased) (Environment and Land Appeal E005 of 2023) [2024] KEELC 6158 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

M SILA, J

SEPTEMBER 24, 2024

BETWEEN

KENNETH ORENGE BASWETI APPELLANT

AND

**YOBENSIA BITENGO OGWERI (SUING ON BEHALF OF THE ESTATE OF
OGWERI NYARWABA - DECEASED) RESPONDENT**

*(eing an appeal against the judgment of Hon. Paul Biwott, Senior Principal
Magistrate, Ogembo Law Courts, in the suit Ogembo SPMCC/ELC No. 10 of 2015,
Yobensia Bitengo Ogweri vs Kenneth Orange Basweti, delivered on 27 January 2023)*

JUDGMENT

(Appellant sued to give vacant possession of suit premises; respondent as plaintiff claiming that the property belongs to the estate of the deceased that she represents; appellant claiming to have purchased the suit property from the deceased and that he took possession and developed it; appellant relying on sale agreements which he exhibited in court; respondent denying that the deceased signed the sale agreements; trial court holding that there was a sale pursuant to the sale agreements but the full purchase price was not paid; trial court entering judgment for the respondent hence the appeal; proof of execution of agreements that require attestation; no attesting witness called; agreements therefore remain unproved; appellate court not persuaded that the sale agreements were proved to the required standard; without proving the sale agreements it cannot be said that the appellant has proved purchase of the suit property; appeal dismissed)

1. The suit was commenced through a plaint filed on 16 January 2015 which plaint was subsequently amended on 20 August 2021. In the amended plaint, the respondents pleaded to be the personal representatives of the estate of Ongweri Nyarwaba (deceased). They averred that the deceased was the registered proprietor of the land parcel Majoge/Boochi/2143 upon which he had developed rental houses and was receiving rent at the time of his death including from the appellant. They alleged that



- the appellant had turned round and started claiming that he had purchased the land and houses therein. In the suit they asked for a declaration that the suit land forms part of the estate of the deceased, a permanent injunction against the appellant, eviction of the appellant from the suit premises, general damages for trespass, and costs.
2. The appellant filed defence which he also amended and included a counterclaim. He admitted that the suit land was registered in the name of the deceased. He however pleaded that the deceased had sold to him the suit land in an agreement dated 23 January 2007 and the respondents could not now claim it. He pleaded that the respondents were aware of the sale before the death and burial of the deceased and that he made several efforts to have them transfer the land to him but they gave one excuse or another until they filed the suit. He averred that after buying the land he took possession and made the developments therein. He pleaded that he used the premises for business and for his residence. In his counterclaim he asked for a declaration that the sale agreement between himself and the deceased was not revoked; a declaration that he is a beneficiary of the estate of the deceased by virtue of the sale agreement; an order to compel the administrators of the estate of the deceased to execute the transfer documents in his favour; that the plaintiff's suit be dismissed with costs.
 3. A reply to defence and defence to counterclaim was filed. The respondents pleaded not to have any information concerning the sale of the suit land to the appellant. They averred that the appellant trespassed into the suit land without any justifiable reason. They insisted that the appellant was a trespasser.
 4. With the pleadings settled, the matter proceeded for hearing.
 5. PW-1 was Yobensia Bitengo. She testified to be a widow of the deceased. She stated that the appellant used to pay rent but failed to do so later. She demanded that he moves out but he claimed to have purchased the property. Cross-examined, she could not recall when he started renting the premises. She affirmed that the deceased died in 2011 and she filed suit in 2015. She stated that between 2011 and 2015 she was not getting any rent and that is why she came to court. She did not want rent from the appellant and did not demand for rent as she wanted vacant possession. She insisted that it was her husband who put up the structures on the land and not the appellant.
 6. With that evidence the respondent closed her case.
 7. DW- 1 was the appellant. His case remained that he purchased the suit land through the sale agreement of 29 June 2007 and another hand written agreement dated 29 June 2007 which he exhibited. He testified that he applied for electricity connection to the property and exhibited the quotation from Kenya Power & Lighting Company (KPLC). He was cross-examined on the KPLC quote which he acknowledged to show an isolated parcel and the suit land is not specifically cited therein. He also conceded that they did not proceed to the Land Control Board. The plot had three permanent structures on it. He was aware that the vendor had a family and children but nowhere did they sign regarding the sale. He asserted to be a beneficiary of the estate of the deceased. He was not aware if any succession case had been filed. He affirmed that he was the one in occupation of the property.
 8. DW – 2 was Richard Isanda Asiago. He is a mason. His evidence was that he constructed a house for the appellant on the suit premises and that he did the work between 2008 and 2009.
 9. DW – 3 was Wilfred Nyabwari. He is a welder. His evidence was that the appellant gave him work to make doors and windows for him on the suit land between 2008 and 2009.
 10. DW – 4 was David Ongoru. He owns the plot next to the suit land. His evidence was that the appellant informed him that he had purchased the suit property and requested him to allow him use part of his wall to erect his structures. He also requested him to use his piped water and electricity while



- he arranged to connect his own. Cross-examined, he acknowledged that he did not witness the sale agreement. He never asked the deceased if he had sold the plot to the appellant.
11. DW – 5 was Bethwel Masese. He is a teacher by profession. He relied on a witness statement that he had recorded as his evidence. He stated that sometimes in 2007, the appellant requested him to witness payment of money to the deceased. They requested him to write down an agreement for payment of Kshs. 70,000/= which he did and they all signed. Cross-examined he stated that the vendor had no witnesses while the purchaser had witnesses. He affirmed that he is the one who wrote down the agreement and that he witnessed payment being made. He acknowledged that the agreement does not mention the parcel of land being sold nor its size. He was a tenant of the appellant at that time.
 12. With the above evidence the appellant closed his case.
 13. Counsel were invited to write their final submissions, which they did. For the respondent (as plaintiff) it was urged that the sale agreement did not show any witnesses on the vendor's part and it was not explained why the vendor could not get his witnesses while the buyer had. It was also submitted that there was no consent of the Land Control Board hence the transaction was voided by the provisions of the *Land Control Act*, Cap 302, Laws of Kenya. On the prayer by the appellant to be declared a beneficiary counsel urged that the court was not a succession court. For the appellant (as defendant/counterclaimant) it was submitted that there was a valid sale agreement pursuant to Section 3 (3) of the *Law of Contract Act*, Cap 3, Laws of Kenya. On the issue of Land Control Board consent, it was submitted that consent was not required as the land was a commercial plot within Ogembo Municipality/Market and that it already had a three roomed structure and not agricultural land. It was submitted that even if it was agricultural land consent was not mandatory pursuant to the pronouncement of the Court of Appeal in the case of *Aliaza v Saul*, Civil Appeal No. 134 of 2017 (2022) KECA 583.
 14. In the judgment, the trial Magistrate could see that the contested sale agreement indicated that it was drawn by Mr. Sagwe Advocate but he was never called as a witness. Despite this he still held that on a balance of probabilities there was a sale agreement but that the appellant had breached the terms thereof. He found that the appellant proceeded to develop the land without first clearing the purchase price. He held that he could not order a transfer to the name of the appellant as the appellant had not paid a balance of Kshs.80,000/= at the time of death of the vendor in 2011. He was of opinion that his remedy lies in refund, if at all, or the consequences in the contract itself. He reasoned that because of the breach the contract is voided and the property reverts to its owner. He found him to be a trespasser. On general damages he did not give any as he thought them not proven. He awarded costs of both the main suit and the counterclaim to the respondent.
 15. Aggrieved, the appellant filed this appeal. There are 16 grounds cited but they are drawn in general terms more or less contesting the judgment, and I see no need of laying them out seriatim. The appellant seeks to have the judgment set aside and substituted by an order allowing the counterclaim.
 16. I directed the appeal to be argued by way of written submissions and I have seen the submissions of both counsel for the appellant and the respondent. I have taken these into account before arriving at my decision.
 17. This is a first appellate court and it has a duty to re-evaluate the evidence and come up with its own conclusion.
 18. The case of the respondent was that the suit land is registered in the name of the deceased and it fell to the estate. The position of the appellant was that he had purchased the suit land and it now belonged to him. He asserted that the land was sold through the sale agreements of 23 January 2007 and 29 June



2007. The first question that I wish to address myself is whether it has been proven to the required standard that there was a valid and enforceable sale agreement between the appellant and the deceased.

19. The appellant presented two documents which he asserted constitute the sale agreement between himself and the deceased. I have looked at them. The first is the agreement dated 23 January 2007. I can see that it provides the vendor to be Ogweri Nyaruaba and the purchaser to be the appellant. It is a brief agreement which I can set out in full. After the introduction of the parties it provides as follows :

WHEREAS The vendor is willing to sell and the vendee is ready to purchase part of the land registered or known as Majoge/Boochi/243 which said plot has permanent structure thereon and is registered in the name of the vendor and selling therefrom a parcel containing by measurement 25 ft by 80 ft or thereabout and same is situated at/within Ogembo in Mang'ere Sublocation at a price of Kshs. 250,000/= (two hundred thousand shillings) only.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS

In consideration of full payment of Kshs. 100,000/- (one hundred thousand shillings) only paid by the vendee to the vendor on or before execution hereof receipt whereof the vendor doth hereby acknowledge and hereby agrees to arrange for transfer from the registered owner of the said land unto the vendee without any reservation or encumbrances subject however to the covenants that :

1. The vendee shall take possession of the said plot immediately on the signing of this agreement.
2. The vendee has inspected the property before the date hereof and the boundaries have been demarcated or pointed out to him.
3. The vendor covenants not to enter into any contract of sale of the said plot to a third party.
4. The vendor shall do all things and take such steps to affect the transfer of ownership of the said plot.
5. Any party that shall break the terms of this agreement shall pay to the to the other party three times the purchase price as a penalty in addition to refunding the whole purchase price.

The balance shall be paid in two dispersed intervals of Kshs. 50,000/= and Kshs. 100,000/= respectively on or before the end of July, 2007 and December, 2007.

In witness whereof the parties have set their hands and seal at Ogembo on the date and year first herein written.

Signed by the vendor Ogweri Nyaruaba

In the presence of (signature no name provided)

Signed by the vendee

Kenneth Orenge Basweti

In the presence of

(signature)

Witnessed by

David G. Basweti



Nelson Basweti

All in the presence of :

(signature and stamp of

Drawn By

S.M Sagwe & Co Advocates

(Address given).

20. The second agreement is hand written and it will be recalled that DW-5 stated that he is the one who hand wrote it on instruction of the parties. It provides as follows :

Land Sale Agreement

This agreement is made on this 29th day of June 2007 between Ogweri Nyaruamba of ID xxxx and Kenneth Orege Basweti of ID No. xxxx.

This agreement is a follow up to the first one made on the 23rd day of January 2007 which stipulated in among other things that the vendee makes the second payment of Kshs. 50,000/= on top of the first payment of Kshs. 100,000/ at the end of July 2007.

However, the vendor and the vendee has agreed in principle that the vendee pay on this day of 29th June 2007 a sum of Kshs. 70,000/= which he has done.

Consequently, this makes the balance to be Kshs. 80,000/= owned to the vendor (not clear)

Signed by the said vendor

Ogweri Nyaruaba

(signature present)

Signed by the said vendee

Kenneth Orege Basweti

(signature present)

Witnessed by :

1. Bethwel Masese (signature present)
2. Fadhil Mizzah Orege (signature present)

(Not clear what follows).

21. Now, the validity of agreements is governed by the Law of Contract Act, Cap 23, Laws of Kenya. For land agreements, Section 3(3) applies and it is drawn as follows :-

- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:



Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

22. The proviso to Section 3(3) of course does not apply to our case since the sale herein was never by way of a public auction. What we can pick from Section 3 (3) is that for a sale agreement to be enforceable, it must be in writing, it must be signed by all the parties, and the signatures must be attested.

23. In our case, the first agreement is typed and is said to have been drawn by M/s S.M Sagwe & Company Advocates. On the face of it the document appears signed and attested by S.M Sagwe Advocate. There are also two witnessed who are indicated therein. Now, it will be recalled that it is contested that the deceased ever signed the sale agreement. What does the law say on such contestation ? It will be recalled that the sale agreement is a document that requires attestation and we must therefore now turn to Sections 70 - 73 of the *Evidence Act* which are drawn as follows :

70. Proof of allegation that persons signed or wrote a document.

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

71. Proof of execution of document required by law to be attested.

If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.

72. Proof where no attesting witness found.

Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

73. Admission of execution of attested document.

The admission of a party to an attested document, of its execution by himself, shall be sufficient proof of its execution as against him though it be a document required by law to be attested.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.

24. Let me break down the above provisions. Under Section 70, it is a requirement that the signature of the person must be proved. For a document that requires attestation, proof of its execution needs to be given by the person who attested its execution. If the attesting witness cannot be found or is incapable of giving evidence, it needs to be proved that the attestation is in his handwriting. Section 73, addresses



- when to waive the requirement to call an attesting witness; that is where execution is not denied, or the document is registered unless its execution is denied.
25. The waiver under Section 73 cannot apply in our case since the document is not registered and it is also a contested document. It follows that the proof of its execution could only be proved by calling an attesting witness. The appellant did not call any of those persons who are noted to have attested either the first or the second agreements. For the first agreement there is attestation by Mr. Sagwe, David Basweti and Mr. Nelson Basweti. None of them was called as a witness. For the second agreement, the witnesses are Bethwel Masese and Fadhil Mizzah Orege. None were called as witnesses. Given that the document was contested and its execution denied, for it to be proved, the appellant needed to call the attesting witnesses but he did not. It follows that the execution of the document by the deceased remains unproved. Being unproved as required by law the sale agreements cannot be said to be valid and cannot pass the test of Section 3 (3) of the [Law of Contract Act](#) as the signature of the vendor has not been proved.
 26. The evidence of DW- 5 does not help the appellant because he is not listed as an attesting witness. Neither does the fact that the appellant took possession of the suit property and developed it. For the contract to be enforceable, the sale agreement needed to be proved as required by law, and it has not been so proved as I have elaborated above.
 27. The result therefore is that this court finds that there is no valid proved sale agreement of the suit land to the appellant. I proceed to overturn the finding of the trial court that there was proved to be a sale agreement between the parties.
 28. Having found that the sale agreement is unproved the entire case of the appellant must collapse for it is hinged on the contention that there was a valid sale agreement of the suit property. It is not even necessary for me to address myself on the question of consent of the Land Control Board for there must first be a valid sale agreement, and I have already found out that there is none. I also need not address myself on whether or not there was breach of such agreement for I find it unproven to the required standard. However, if I was to find that there was a sale agreement, and I have not found it proven, I would have found that there was breach of it. The purported sale agreement was entered into on 23 January 2007. It provided for a purchase price of Kshs. 250,000/=. The sale agreement was of course poorly drafted for it says that Kshs. 100,000/= is full payment when in fact it is only part payment. That sale agreement states that the balance was to be paid in two instalments of Kshs. 50,000/= and Kshs. 100,000/= on or before end of July 2007 and December 2007. Even assuming that the second agreement dated 29 June 2007 is valid, only Kshs. 70,000/= was paid. There is no proof of payment of any other money meaning that there was a balance of Kshs. 80,000/= as found by the trial Magistrate. Without proving that he had paid the balance the appellant could not get the orders that he asked for in his counterclaim. Thus even assuming that the sale agreements were proven the appellant would still not succeed and his counterclaim would be dismissed.
 29. Although I have disagreed with the trial court on proof of the sale agreement, whatever the case, I would still not reverse the conclusion of the trial court in allowing the case of the respondent and dismissing the counterclaim of the appellant. The respondent did demonstrate that the suit land is registered in the name of the deceased. Unless a valid sale was proved, and it was not, the estate of the deceased deserves to be declared the owner and the appellant permanently restrained from it. The respondent was entitled to the order for the eviction of the appellant.
 30. My core finding remains that it was not proved to the required standard that the deceased executed the sale agreements in favour of the appellant. My subsidiary finding is that if the sale agreements were ever proved, which is not the case, the appellant would still fail in his prayers for not having paid the



balance of the purchase price. The respondent may probably have had a case for the award of general damages, which she asked for, but which she was not given. But there is no cross-appeal and I need not address myself on that.

31. The result is that this appeal fails and is hereby dismissed with costs.

32. Judgment accordingly.

DATED AND DELIVERED THIS 24 SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered In The Presence Of:

Mr. Begi h/b for M/s Ocharo Kaba & Company Advocates for the appellant

Mr. Angima h/b for Mr. Ochwangi for the respondent

Court Assistant – David Ochieng’

