



REPUBLIC OF KENYA



**Ali v Ali & another (Environment & Land Case 156 of 2017)  
[2024] KEELC 7517 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7517 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 156 OF 2017  
JO OLOLA, J  
NOVEMBER 14, 2024**

**BETWEEN**

**MWANASHANI OMAR ALI ..... PLAINTIFF**

**AND**

**RUKIA OMAR ALI ..... 1<sup>ST</sup> DEFENDANT**

**MOHAMED HABSHY SHARIFF ALWY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. By a Plaint dated July 17, 2017 Mwanashani Omar Ali (the Plaintiff) prays for Judgment against the Defendant for:
  - i). A declaration that the suit properties, that is, the houses without land at Mwandoni in Mombasa County and the house without land on Plot Number 1389 Portion 26 Barani belong to the Plaintiff, the Defendant and their sister Amina Omar Ali;
  - ii). A declaration that the sale of the suit properties by the Defendant without the consent and or authority of the Plaintiff and or their sister Amina Omar Ali is null and void and is of no legal effect;
  - iii). An order that the Defendant do handover the ownership document of the said properties to the Plaintiff; and
  - iv). Costs of this suit.
2. Those prayers arise from the Plaintiff's contention that before his death in the year 2004, their father gifted both the Plaintiff and the Defendant jointly with their sister Amina Omar Ali the two properties situated at Barani and Mwandoni. The Plaintiffs asserts that at the time of their father's death, both the



Plaintiff and the said Amina Omar Ali were based in the Kingdom of Saudi Arabia and they entrusted the defendant herein with the management of the suit properties.

3. It is the Plaintiff's case that when they returned from Saudi Arabia, they heard from relatives that the Defendant had sold the Mwandoni property and that she was also in the process of selling the Barani property. It is the Plaintiff's case that since then, the Defendant has been avoiding the Plaintiff and the Defendant has completely refused to avail any documents and/or information in regard thereto.
4. In her Statement of Defence dated 10<sup>th</sup> August 2017, Rukia Omar Ali (the Defendant) states that there exists two buildings on Plot No. 1389 which was acquired and owned by their late father and which was on his death bequeathed to the three sisters. It is however the Defendant's case that the House on Plot No. 1389/26 is owned solely by the Defendant.
5. The Defendant denies having sold the Mwandoni House without the involvement of her siblings and asserts that her siblings were actively engaged in the disposal of the said house.
6. The Defendant maintains that the House No. 1389/26 solely belonged to her and that she had since sold the same to one Mohamed Habsby Shariff in her own right as the owner thereof.
7. Following the filing of a Notice of Motion application herein dated 6<sup>th</sup> September 2017, Mohamed Habsby Sheriff Alwy was enjoined herein as the 2<sup>nd</sup> Defendant on 23<sup>rd</sup> July 2018.
8. In his statement of Defence and Counterclaim dated 17<sup>th</sup> September 2018, the 2<sup>nd</sup> Defendant avers that he did lawfully purchase the commercial cum residential building erected on Plot No. 1389 (Portion No. 26) situated at Barani from the 1<sup>st</sup> Defendant.
9. By way of the Counter-claim the 2<sup>nd</sup> Defendant prays for Judgment against the Plaintiff for orders drafted and pleaded therein as follows:-
  - a). The sale of the specific subject herein being commercial cum residential building standing on Plot No. 1389 (Portion No. 26) situated at Barani along Sheikh Nassor Street in Malindi to the 2<sup>nd</sup> Defendant through an agreement for sale dated 20<sup>th</sup> August 2016 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be declared as proper and lawful (sic); and
  - b). The Plaintiff and the 1<sup>st</sup> Defendant jointly and severally be liable for the rent effectively from the month of August 2017 for Kshs. 30,000/= per month till vacant possession is handed over (sic).

### **The Plaintiff's Case**

10. Mwanashani Omar Ali (the Plaintiff) testified as the sole witness in her case. Relying on her Witness Statement filed herein, the Plaintiff told the court that the defendant is her sister. She told the court that sometime before their father died in the year 2004, he had gifted the Plaintiff, the Defendant and their sister Amina Omar Ali two properties. The first was a house without land at Barani erected on Plot No. 1389 Portion No. 26 while the other was a house without land situated at Mwandoni in Mombasa County.
11. The Plaintiff told the court that at the time their father died, her sister Amina and herself were working in the Kingdom of Saudi Arabia and that they therefore entrusted the Defendant with the management of the two houses. It was the Plaintiff's case that she returned to Kenya in the year 2017 whereupon she learnt from their relatives that the Defendant had sold the Mwandoni property and that she was in the process of selling the Barani property.



12. The Plaintiff testified that her efforts to get information and or documents relating to the two properties had not been successful as the Defendant had refused, ignored and or neglected to communicate with her.

### **The Defence Case**

13. On their part the Defence called 3 witnesses in support of their case.
14. DW1- Rukia Omar Ali is the 1<sup>st</sup> Defendant. Relying on her statement dated 14<sup>th</sup> May 2019, as filed herein on 17<sup>th</sup> June 2019, DW1 told the court the Plaintiff and one Amina Omar Ali were sisters being the daughters of one Omar Ali and Fatuma Mohamed Bwanamkuu.
15. DW1 testified that on 12<sup>th</sup> July 1997, she accompanied her father together with one Sheikh Mohamed Bin Ali to the offices of one M.M. Kupalia Advocates where they entered into an agreement that their father had bought them Plot No. 1389 Portion No. 26 Barani from the said Sheikh Mohamed. She told the court their father chose her as the administrator of the property as her two sisters were still young at the time.
16. DW1 testified that on 20<sup>th</sup> August 2016, she accompanied their mother to J.K. Mwarandu & Co. Advocates where they entered into an agreement with the 2<sup>nd</sup> Defendant to lend them Kshs. 150,000/= so that they could repair the house. DW1 told the court that at the time they entered the agreement with the 2<sup>nd</sup> Defendant, her two sisters were abroad.
17. DW1 testified that they agreed with the Defendant that he would collect rent from the tenants until the full loan was repaid. It was her case that she was shocked to later learn from one of the tenants that the 2<sup>nd</sup> Defendant was claiming they had sold the house to him for Kshs. 1,500,000/=. She told the court the 2<sup>nd</sup> Defendant was taking advantage of the fact that she does not know how to read and write.
18. DW2- Fatuma Mohamed is the mother to the 1<sup>st</sup> Defendant. She told the court they did not sell the land to the 2<sup>nd</sup> Defendant but only used it to get a loan of Kshs. 150,000/= from him.
19. DW3- Shujaa Wara is an Advocate practicing with J.K. Mwarandu & Co. Advocates. He told the court he was the one who prepared the Agreement dated 20<sup>th</sup> August 2016 between the 1<sup>st</sup> Defendant as the Vendor and the 2<sup>nd</sup> Defendant as the Purchaser.

### **Analysis And Determination**

20. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions placed before the court by the Learned Advocates representing the parties.
21. By the Plaint dated and filed herein on 17<sup>th</sup> July 2017, the Plaintiff had sued the 1<sup>st</sup> Defendant herein who is her sister for a declaration that the house without land situated on Plot No. 1389 Portion 26 Barani and another house without land situated at Mwandoni in Mombasa County belong jointly to the Plaintiff, the Defendant as well as their sister Amina Omar Ali.
22. The Plaintiff further sought a declaration that the sale of the two properties by the Defendant, without the consent and/or authority of the two sisters was null and void and of no legal effect. She further sought an order compelling the Defendant to hand over ownership documents pertaining to the properties to herself.
23. It was the Plaintiff's case that the suit properties were gifted to the three sisters by their father Omari Ali Chuma prior to his death in the year 2004. The Plaintiff told the court that since both her sister Amina



and herself were working in Saudi Arabia at the time of their father's death, they had entrusted the management of the properties to the Defendant but the Defendant had since sold the same without the consent and/or authority of the other sisters.

24. On her part, the 1<sup>st</sup> Defendant denied single-handedly selling the Mwandoni house. It was her case that the said house was sold jointly by the three sisters after they all agreed to sell the same. In regard to the Barani property erected on Plot No. 1389 Portion No. 26, the 1<sup>st</sup> Defendant pleaded that the same solely belonged to herself and that in the exercise of her proprietary rights thereto, she had sold the same to one Mohamed Habshy Sharif Alwy at a consideration.
25. Following an application made herein by the said Mohamed Habshy Shariff Alwy, he was on 23<sup>rd</sup> July 2018 enjoined as the 2<sup>nd</sup> Defendant. Subsequently and by a Statement of Defence and Counter-claim dated 17<sup>th</sup> September 2018 the 2<sup>nd</sup> Defendant asserted that he had lawfully purchased the commercial cum residential building that was erected on the said Plot No. 1389 (Portion No. 26) and situated at Barani in Malindi.
26. By his Counterclaim, the 2<sup>nd</sup> Defendant sought to be declared the proper and lawful owner of the said property and for the Plaintiff and the 1<sup>st</sup> Defendant to refund to him the sum of Kshs. 30,000/= collected as rent every month from August 2017 until such a time that the two sisters would grant him vacant possession of the premises.
27. In support of her case, the Plaintiff produced a copy of an agreement executed on 17<sup>th</sup> July 1997. That agreement indicates that the 1<sup>st</sup> Defendant herein had by the consent of her father Omar Ali Chuma agreed to be the legal owner of the said Plot No. 1389 Portion No. 26 Barani. The same agreement executed by the 1<sup>st</sup> Defendant and her father reads as follows at Paragraphs 2 to 4 thereof:
  2. That I do hereby join as legal owners of the said plot my two sisters Amina Omari Ali Chuma and Mwanashani Omari Ali Chuma holdres of identity card numbers .....and 2079892 respectively;
  3. That on the said plot stands a Hotel, Mwambao Hotel and a residential house; and
  4. That the said plot is a gist (sic) from our father Omari Ali Chuma.”
28. In further support of her case, the Plaintiff produced a second agreement executed on the same 12<sup>th</sup> day of July 1997 between the 1<sup>st</sup> Defendant and one Sheikh Mohamed Bin Ali who is shown therein to have sold the plot together with the improvements therein to the 1<sup>st</sup> Defendant at Kshs. 350,000/=.
29. While in her pleadings filed herein the 1<sup>st</sup> Defendant had insisted that the Mwandoni property was sold jointly by the three sisters, she changed that position at the trial and told the court that together with her sister Amina, they had wrongfully sold the Mwandoni property without involving the Plaintiff herein.
30. Perhaps even more startling was the 360 degree turn that the 1<sup>st</sup> Defendant made in regard to the property erected on Portion No. 1389 Portion 26 in Barani. While the 1<sup>st</sup> Defendant had pleaded that the property was solely gifted to herself and that she had in exercise of her proprietary rights sold the same to the 2<sup>nd</sup> Defendant, at the trial, she told the court she had not sold but had pawned the property to the 2<sup>nd</sup> Defendant without the involvement of the Plaintiff.
31. It was the 2<sup>nd</sup> Defendant's case that she had merely pawned the property for a sum of Kshs. 150,000/= which sum was to be recovered from the monthly rent that was hence to be collected on their behalf by the 2<sup>nd</sup> Defendant.



32. Baffling as it might appear, that was the same position supported by the mother of both the Plaintiff and the 1<sup>st</sup> Defendant. Testifying as DW2, Fatuma Mohamed told the court she and her 1<sup>st</sup> Defendant daughter had merely used the property to secure a loan of Kshs. 150,000/= from the 2<sup>nd</sup> Defendant. She told the court she does not know how to read and write and that she only came to learn much later that the 2<sup>nd</sup> Defendant was claiming that they had sold the Barani property to himself.
33. As it turned out the 2<sup>nd</sup> Defendant did not get to testify herein as at the time he was due to testify, he was reportedly unwell and outside the country seeking medical attention. That being the case, the statements made in his pleadings remained unsupported and did not amount to much.
34. While the 2<sup>nd</sup> Defendant's Advocates caused summons to issue to Mr. Shujaa Warrach, the Advocate who allegedly prepared the Sale Agreement between the 1<sup>st</sup> Defendant and himself, I was unable to place much reliance on that testimony. Other than preparing the Agreement, it turned out that when the 1<sup>st</sup> Defendant was first sued herein, it was the same Mr. Shujaa Warrach Advocate who prepared and filed the 1<sup>st</sup> Defendant's defence. It was the Advocate's testimony herein that he did not see the 2<sup>nd</sup> Defendant pay the purchase price of Kshs. 1,500,000/= to the 1<sup>st</sup> Defendant as at the time the parties went to him, they had already concluded the payments.
35. In the circumstances of this case and given the averments by the 1<sup>st</sup> Defendant and her mother (DW2) that they did not know how to read and write and further that they did not sell the Barani property, I did not think this court could safely come to the conclusion that the 1<sup>st</sup> Defendant had sold the property to the 2<sup>nd</sup> Defendant given that the Advocate who prepared the Agreement never witnessed any exchange of the alleged purchase price.
36. In the circumstances, the only evidence placed before the court points out the fact that the Barani property was jointly gifted by the Plaintiff's father to her three (3) daughters and that the 1<sup>st</sup> Defendant could not solely dispose of the same without involving her sisters.
37. In the premises, I am persuaded that the Plaintiff has proved her case on a balance of probabilities. Accordingly I enter Judgment for the Plaintiff in terms prayers (i) and (ii) of the Plaintiff with an order that each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

In the presence of:

No appearance for the Plaintiff.

No appearance for the Defendant.

Court Assistant: Kendi

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**J. O. OLOLA**

**JUDGE**

