



Thanga Wrongly Sued as Anne Kathure Marimba v M'Mmauta (Environment and Land Appeal 20 of 2022) [2023] KEELC 21123 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 20 OF 2022
EK MAKORI, J
OCTOBER 25, 2023**

BETWEEN

**ANN KATHURE THANGA WRONGLY SUED AS ANNE KATHURE
MARIMBA PLAINTIFF**

AND

FESTUS M'MMAUTA DEFENDANT

(An appeal arising from the Ruling of the Senior Principal Magistrates Court at Kilifi delivered in SPMCC ELC NO.324 OF 2018 on 25th of May 2022 by Hon. Kituku SPM)

JUDGMENT

1. This is an appeal from the decision of the Magistrate Court sitting at Kilifi (Kituku SPM) delivered on 25th May 2022.
2. The grounds are set out on the Memorandum of Appeal dated 20th of June 2023 as follows:
 - a. The Trial Court failed to consider the material contradiction in evidence and testimony from the respondent.
 - b. The Court erred in finding for the respondent.
 - c. The court did not consider the submissions made by the appellant.
 - d. The court failed to make a proper finding based on the evidence before it.
 - e. The court considered extraneous issues in arriving at its verdict.
 - f. The court failed to consider that the house was non-existent.
3. The Magistrate had found that the house standing on plot No. 593 Mtwapa belongs to the Respondent.



4. From the record the basis for the finding of the Magistrate is that the Respondent purchased the house from one Munyao on 16th June 1983 at a consideration of Kshs. 120,000/-

5. The Appellant submitted the house existed while the Respondent said it did not exist and had been pulled down. This is a first appeal and it has oftentimes been stated that this court must analyze and re-assess the evidence on record and reach its own conclusions. In *Selle v Associated Motor Boat Co.* [1968] EA 123, it was expressed:

“Briefly put they are that this Court must reconsider the evidence, evaluate it itself, and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”

6. I have considered and reviewed the record of the trial court. The issue that stands for the decision of the court is who among the parties herein owns(*sic*) the house without land – the subject of this appeal? The issue then boils to the current jurisprudence on a “house without land.” The house in issue is alleged to have been purchased by the respondent from one Munyao (his former landlord) in the year 1983 at a consideration of Kshs. 120,000/-. The appellant - a relative took over the house and failed to pay him rent as of the year 2011. In 2017 he discovered that she had renovated the house claiming ownership and stating that the house belonged to her late grandfather Eliud Ntong’ondy.

7. In his final analysis the Magistrate stated:

“It is not in dispute the parties are claiming ownership of a house and not the land upon which it is built.

The concept is commonly known as “House without land” while the Plaintiff states he bought the house from one Munyao in 1983, then invited Defendant’s grandparent to stay with him in the said house. The Defendant states the house belonged to her grandfather who invited her to stay with him in the said house. The defendant states the house belonged to her grandfather and the plaintiff is keen to take it from her. The Defendant does not have any documents to show when her grandfather bought the house, did the construction, and from whom.

8. The Magistrate further proceeded:

“Actually, the land owner would have been the best witness to resolve the issue of the house, but none of the parties called the land owner as a witness. The Defendant has not told the court on what basis she claims the house belonged to her grandfather despite clear evidence the plaintiff bought it and then invited her grandparents to stay with him which is common in our African culture. Who told her the house belonged to her grandparents yet she was not yet born when they started staying in the house?

Since the Plaintiff has produced a sale agreement to show how he acquired the house, I believe his version of evidence and that he had left the defendant as caretaker to safeguard the Plaintiff’s interest.



I also find the Defendant is not the administrator of the estate of her deceased grandparents, and cannot therefore put a stake in the ownership of the house. Consequently, I allow the Plaintiff's plaint in terms of prayer 1, 2, 3 with costs to the Defendants.”

9. The concept of house without land has been addressed by the Bench of the Court of Appeal Judges sitting in Malindi (this is a common phenomenon here at the Coast region - see for example the case of *Abdukarazak Khalifa Salimu v Harun Rashid Khaton & 2 Others* [2018] eKLR :

“Yet again the concept of house “Without Land” is back before this court. In Coastal Kenya a land tenure known as house without land is common. This is where a person can own a house without owning the land upon which the house stands. In *Famau Mwenye & 19 others v Mariam Binti Said, Malindi* HCC No. 34 of 2005 (Ouko J.) - as he then was, described the concept of a house without land as follows:

“ The dispute arises from land tenure unique.... to Mombasa which has baffled scholars, practitioners, and even jurists. That land system is only referred to as “House without Land” that is the owner of the house is different from the owner of the land on which it stands. It therefore defies the common land concept of land expressed in the Latin Maxim (*cujus est solum ejus usque ad coelum*) meaning - is the soil, his is also that which is above it).”

10. Put it this way, in this matter, the appellant says he was sold the house by one Munyao in 1983 and the Defendant says she inherited it from her grandparents. None owns or has title to the land where the house stands if it exists. They have to go to the drawing board and check on who owns or has title to the land in question. It is that person who will pass a good title or permit their stay. The holding in the *Abdukarazak Khalifa Salimu* Case is that a person claiming to be entitled to a house without land has to acquire that right with the consent of the landowner. Usually, one is treated as a tenant with the landlord having a right to terminate that tenancy after appropriate notice. The land is said to belong to a landlord called Munyao (as per the respondent) or the grandfather of the appellant (as per the appellant). As correctly observed by the trial court the owner(s) was/were never called to crystalize that right. This is where in my view the trial court erred and at this point, both the appellant's and the respondent's right to the house without land run parallel, and none has a superior right over the other. They are tenants at will of an unknown landlord. None can claim to be the landlord and the other the tenant and vice versa.
11. The upshot is that the appeal is allowed with no order as to costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 25TH DAY OF OCTOBER 2023

E.K. MAKORI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

Mr. Okanga for the Respondent



Mr. Mr. Odongo for Appellant

