Sheikh v Ahmed (Environment and Land Appeal E030 of 2024)
[2025] KEELC 339 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEELC 339 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E030 OF 2024

SM KIBUNJA, J

JANUARY 29, 2025

BETWEEN

ABDULWAHAB ABRAR SHEIKH ..... APPELLANT

AND

ABDULAZIZ KASSIM AHMED ..... RESPONDENT

(Being an Appeal Against the Judgement Delivered on 4th July 2024, by Hon. Lucy K. Sindani, PM, and decree Issued on 12th August 2024, in Mombasa CMC ELC No. E104 of 2022)

JUDGMENT

1. The appellant, being dissatisfied with the Judgment of the trial court delivered on 4th July 2024 by Hon. L.K. Sindani in MCELC NO. E104 of 2022, filed this appeal through the memorandum of appeal dated 30th July 2024, and raised twelve (12) grounds which the court has summarised as follows:

    a. The learned principal magistrate erred in failing to appreciate the concept of house without land, thereby failing to appreciate that the appellant's consent/authority is a condition precedent to the Respondent's occupation/enjoyment of house without land located on the suit property.

    b. The learned principal magistrate erred in law and fact in failing to find that the appellant had duly served the respondent with a three [3] months notice to vacate the suit land, which he did not comply with or challenge.

    c. The learned principal magistrate erred in law and fact in failing to grant the eviction and demolition orders sought by the appellant.

    d. The learned principal magistrate erred in failing to appreciate that the (Swahili house) concept of house without land is temporary in nature and that the respondent had changed the structural form or nature of the house from temporary to permanent without written consent.

e. The learned principal magistrate erred in law and fact in failing to find that the respondent breached the terms and conditions of the agreement between him and the appellant when he carried out construction works and or repairs on the suit property without the appellant's consent.

f. The learned principal magistrate erred in law and fact in failing to find that he had been denied the use and enjoyment of the suit land and was entitled to an award of general damages, due to the respondent's continued and unlawfully occupation after expiry of the notice to vacate.

g. The learned principal magistrate erred in law and fact in failing to find that the respondent's lease of the suit land lawfully terminated at the expiry of the notice to vacate.

2. The appellant therefore prays for the following orders:

a. That the appeal be allowed.

b. That the judgement of 4th July 2024 by Hon. L. K. Sindani, be set aside and his claim under the plaint dated 14th June 2022 be allowed with costs.

c. That the costs of this appeal be awarded to the appellant.

3. The learned counsel for the appellant and respondent filed their submissions dated 18th October 2024 and 4th November 2024 respectively, which the court has considered.

4. The issues for determination by the court are as follows:

a. Whether the appellant has established any misdirection or misapprehension on any of the alleged matters of law and facts, by the trial court.

b. Who is entitled to costs?

5. After careful consideration of the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior courts decisions cited thereon, the court has come to the following findings:

a. The court in the case of Selle versus Associated Motor Boat Company Ltd [1968] EA 123, it was expressed thus:

> "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

The court in the case of Mursal & Another versus Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April

2022) (Judgment), while citing with approval the case of Santosh Hazari versus. Purushottam Tiwari (Deceased) by L. Rs {2001} 3 SCC 179 held as follows:

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."
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> This court is therefore obligated to look at the pleadings filed before the trial court, the trial court's proceedings, the judgement rendered, the reasons for the decision thereof, and come to its own findings on the matters of law and facts that were in issue.

b. From the plaint filed by the appellant, it is clear his claim is of ownership of subdivision 22367 (C.R 75191), suit property. He also claimed that he gave the respondent consent to purchase a temporary house on the said land on 22nd November, 2000 at an agreed monthly ground rent of Kshs. 1,200/-, that was subject to review from time to time. He claimed that the respondent had not paid rent from 2000, and has accumulated arrears of Kshs. 308,400 as at the time of filing the suit in 2022. Further, that the respondent had without his authority and consent demolished the temporary house and built a permanent house, in breach of their agreement. He therefore sought for inter alia order for respondent to vacate from the suit property, demolition of the house, payment of outstanding ground rent, special damages of Kshs.240,000/-, costs and respondent filed his statement of Defence denying all the allegations, save that the plaintiff is the owner of the suit land and that they had no previous or other pending suit.

c. The proceedings that are between pages 108 to 122 of the record of appeal confirms that the appellant and respondent testified on 22nd February 2024. The respondent called Abullahi Mohamed Abdulrahman, Mammed Abdulatif Mohammed, Aisha Athman Ali, Ahmed Abdullah Khamisi and Mohamed Salim Ali as witnesses.

d. In summary, the appellant adopted the contents of his statement dated 14th June 2022 as his evidence in chief, and produced the documents in the list of even date as exhibits. It was his evidence that he owns the suit property and on it was a Swahili house, built of mud by Swaleh Abudh. That the said Swaleh sold the house without land to the respondent with his endorsement, on condition the respondent would pay him Kshs.1000/- monthly ground rent. That the respondent did not pay the rent for four years, after which he started paying Kshs.1000/- or 1200/- for six years. The appellant told the court that he later looked for the respondent's telephone contact as he lived out of the country and contacted him on the increase of rent to Kshs.3000/-. The respondent told him one Abdullahi Mohammed who was in the country, would be the one paying the rent on his behalf, but the said Abdullahi did not pay. Then the respondent's agents started doing repairs on the house without obtaining his consent, and he reported to the County Government, but when the works continued, he instructed his advocates to serve a notice to vacate or be sued. The respondent did not heed to the notice and this suit was filed. In cross-examination, the appellant confirmed the rent

arrears for the first four years was around Kshs.48,000/= . He also agreed that the agreement that he signed did not indicate that the house subject matter of the sale was temporary or that no permanent house should be built or the amount of rent payable or that his consent must be sought before repairs on the house are carried out.

e. The respondent adopted the contents of his statement dated 2nd August 2022 as his evidence in chief and produced six of the seven documents on the list dated 30th November 2022 as exhibits. He testified in cross-examination that he bought the house without land from the appellant in 2000. He stated that he did not possess the house until 2004 as it was with Swaleh, and that he did not pay rent for that period. That the demand letter was given to him after three years, by the people using the house when he went to do some repairs on the house. That he had sought the County Government consent for the repairs, but had not asked for the appellant's authority. Abdullahi, the respondent's first witness, told the court that he was a tenant in the house in issue and that he came to know the respondent had bought it from the appellant. Mammed, the second witness, told the court he had paid to the appellant Kshs.4,050/- as ground rent that he had received from the respondent. Aisha, the third witness, told the court she was the wife to the respondent and had paid the appellant Kshs.8,000/- as ground rent. Ahmed, the fourth witness, confirmed he was present when the respondent and appellant entered into the oral sale agreement over the house. He confirmed receiving Kshs.12,000 from the respondent and paying it to the appellant as ground rent. In cross-examination, the witness told the court he had paid the appellant ground rent for three years, but no written acknowledgment was received. Mohamed, the last witness, told the court his role is to collect rent in respect of houses left under his management.

f. In the judgement delivered on the 4th July 2024, that is at pages 104 to 107 of the record of appeal, the learned trial magistrate, evidently summarised the evidence presented by both sides and pointed out the issues that were not disputed, including that the appellant owned the suit property; that respondent had purchased the house without land built on the suit land from Swaleh Aboud Abdalla with the consent of the appellant; and that the respondent was to pay ground rent to the appellant. The learned trial magistrate then proceeded to identify the contested issues for determinations to be"whether the defendant has breached terms of the contract by demolishing the Swahili house and building a permanent house and by failing to pay ground rent as agreed and whether the appellant was entitled to the reliefs sought. She held inter alia as follows:

> " The plaintiff confirmed between 2000 to 2003 is for four years thus at the rate of 1000 per month the claim should be for Kshs. 48,000 and not 308,400 claimed. The defendant in his statement in court stated that in the years of 2000 to 2003 he had not taken possession of the house as the seller, one Saleh Aboud, had changed his mind over the sale, and wanted the house back. He stated that he went to court to claim for the refund of the purchase money, and that the two entered into a consent for a refund of the purchase money within five months, in default the defendant therein takes possession. The defendant has exhibited evidence to show that there was a case in court between him and the said Swalleh Aboud, the former owner of the house. This proves that the defendant was not in possession of the house between 2000 and 2003. It however occurs that the house had already been transferred to him, and if there is any claim from the house the one will claim from him. .....

Failure to bring the said Swaleh in the proceedings leaves the burden of meeting the liabilities and costs of a third party on his shoulder. In the circumstances then this court is inclined to hold that the defendant is in arrears of Kshs. 48,000, being ground rent for the period between 2000 and 2003. This however does not mean that the defendant was in breach of the agreement given the frustration that were there in getting possession of the house thus hindering his compliance. The plaintiff is also guilty of laches. He waited for 18years to bring this claim and this being a contractual claim, it is limited by time thus the plaintiff is not entitled to payment thus the claim falls"

On ground rent the trial court held that there was no written agreement and it would not be easy for the trial court to determine with certainty who is telling the truth. On demolition of the temporary Swahili house, the court held that only repairs were done as evidenced by photographs, and that there was approval from the County Government, and in the absence of express agreement, as was held in the case of Bid Insurance Brokers Ltd versus British United Provident Fund [2016] eKLR, it only remained one party's word against another. Hence, the court held there was no breach and consequently the appellant was not entitled to any reliefs.

g. This court has considered the evidence presented before the trial court, and it is crystal clear that the appellant failed to proof that the temporary or semi-permanent house bought by the respondent in 2000 from Swaleh with his consent as the owner of the land it was situated on, had actually been demolished by the respondent and a permanent one erected without his permission or consent. The evidence availed before the trial court show that only repairs on the temporary house had been carried out with approval of the County Government. The sale agreement the appellant had relied on did not provide for the amount of ground rent payable, its increase, prior consent before repairs being obtained as alleged by the appellant. Therefore, I do not find any basis or grounds of faulting the analysis of the evidence tendered before the trial court and the findings made thereof, by the learned trial magistrate in her exercise of the discretion. In the case of Mbogo & Another versus Shah [1968] EA 93, it was held at page 96 that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...."

h. What is apparent from the evidence tendered during the trial, is that the appellant just wants to terminate the tenancy relationship he has with the respondent over the house without land situated on the suit property. No wonder that the appellant did not take any serious efforts to challenge or rebut the evidence of the respondent that was apparent in his written statement and those of his witnesses on the amounts of ground rent paid to him, and by whom, between 2004 to 2022. Indeed, it came out clearly in evidence that the ground rent that the respondent had not paid was for the period between the time of purchase, 2000, and taking over the house, 2004, during which period the house was in possession of Swaleh, the seller/vendor. The appellant did not take any steps to claim the rent for that amount until when he filed this suit, and even then, what he sought for was arrears of Kshs.308,400, without tendering evidence in support. During cross-examination, the appellant conceded the rent payable during that period was Kshs.48,000/- which claim the trial court found was time barred. If the appellant's intention in filing the suit was to terminate the contractual relationship he had with the respondent, then that was not properly taken into account during preparation of the pleadings,

bearing in mind that parties are bound by their pleadings. See Galaxy Paints Co. Ltd. versus Falcon Guards Ltd. EALR (2000)2 EA 385.

i. The suit land belongs to the appellant and he has constitutional rights of protection to property under Article 40 of *the Constitution*. If indeed, he wishes to have the respondent vacate from the said land, and their agreement did not have a specific procedure on the same, and the respondent is not in breach of any of the agreed terms, then he should be specific about it and engage the respondent in accordance with the law. It is instructive to note that there was no counterclaim by the respondent, and that the plaintiff's claim was only dismissed for failing to prove breach of an agreement which was not expressly written and executed as required by section 3 of the *Law of Contract Act* Chapter 23 of the Laws of Kenya. Section 67 (2) (e) of the *Land Act* No.6 of 2012 is relevant and provides that:

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> " 2. If a lessee applies to the lessor for consent to—
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> a .....
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> b .....
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> c .....
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> d .....
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> e. extend, improve, add on to or in any other way develop any building beyond what is permitted in the lease;
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> f. .....
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> g .....
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> h .....
>
> the lessor shall inform the lessee, in writing, within a reasonable time after receiving the application, whether the lessor is giving or refusing consent."
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> It is instructive to note that house without land is still a lease as provided by definition in section 2 of the *Land Act* which states:
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> "lease" means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease;"

j. In the case of Abdukrazak Khalifa Salimu versus Harun Rashid Khator, Ibrahim Rashid & Mustafa Rashid [2018] KECA 151 (KLR) the Court of Appeal held that:

> " In rehashing, we have examined the record of appeal and are satisfied that no formal or statutory notice was issued by the respondents to the appellant to terminate the house without land tenancy arrangement as required by Section 106 of the ITPA. On this ground, the appellant's submission has merit. However, in our considered view, the respondents counterclaim for ejectment and eviction of the appellant from the suit property cannot be defeated or dismissed simply on account of lack of notice. What the appellant is entitled to is reasonable time to vacate the suit property. The trial court gave the appellant a three (3) month notice to vacate. Is this

period reasonable? Pursuant to Section 106 of the TPA, the period of notice that the appellant is entitled to is a minimum of 15 days. We take note that from the year 2003 the appellant has not paid any rent for use and occupation of the suit property through his house without land."

And in the case of William Henry Farrar versus Yusufali Abdulhussein Adamji [1934] Vol. XVI. P1 IKLR 40 app 41-43, it was observed that;

> " It is well settled that by Mohammedan law a building erected by one person – even by a trespasser – on the land of another does not become attached to the land but remains the property of the person who erected it, see Hamilton's Hedaya (Allen's Ed.) p. 539; Secretary of State v Charlesworth (IE.A.L.R. 24) but the argument here is that where a person is the registered owner of a plot of land there is a conclusive presumption that he is also the owner of all buildings whatever kind thereon, unless the person claiming such buildings holds a certificate of interest under section 20(2)(c) of the Land Titles Ordinance, and there is an exception in the certificate of Title to the land. In other words, that the Land Titles Ordinance (Ch. 143) has, to this extent at all events, abrogated the Mohammedan law.
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> In such circumstances the owner of the building stands in the relation either of monthly tenant or of licensee to the landowner, and I understand that it has never been the practice for the owner of such building to have their interest (whatever it be) noted in the Land Registry, although the buildings are frequently made a security for loans by the deposit of some sort of memorandum of charge in the registry of Documents, and, if they are sold, the purchaser either becomes tenant of the site or removes the materials."
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> Further, in the case of Secretary of State for Foreign Affairs v Charlesworth Pilling & Co. & Another [1901] The Law Reports, (HL & PC), 373 the Privy Council considered the evidence of an expert in Islamic Law and stated that:
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> > " Their evidence is conclusive that in a case such as the present the landowner cannot claim possession of buildings placed upon his land by a trespasser, but can only call upon the trespasser to remove the building and restore the land to its original state."
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> It is therefore clear that house without land is a practise founded on Islamic law and in accepted by many people in this jurisdiction, though not specifically provided for by the current land laws. Decisions by the various superior courts that have over years adjudicated over disputes of such nature abound and includes those cited above.

k. Be that as it may, agreements over houses without land still falls under a lease as earlier stated, and as can be seen from the above case laws, and more specifically under section 57 of the *Land Act*, on periodic leases, which should be the guiding provisions when it comes to house without land cases. The court having found no justiciable basis of faulting the findings of the learned trial magistrate on the questions of laws and facts alleged, finds no merit in the appeal.

l. Generally, costs should abide the outcome of the suit/appeal in accordance with the provisions of section 27 of the *Civil Procedure Act*. As it is clear that the appellant has been unsuccessful in this appeal, the respondent shall have the costs.

6. From the foregoing determinations, the court finds and orders as follows:

   a. The appeal has no merit and is dismissed.

   b. That the judgement of the learned trial magistrate delivered on July 4, 2024 is upheld.

   c. There appellant to bear the respondent's cost of this appeal.

   Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF JANUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellant : Mr. Tolo.

Respondent : M/s Waithera

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.