



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 43 OF 2010**

**OMAR MOHAMED ALI .....APPELLANT**

**VERSUS**

**ATHMAN HELF ATHMAN ..... RESPONDENT**

**(An appeal from the judgement of Hon. Ismail A. Abdallah, Kadhi in Civil Suit No. 8 of 2010 of the Kadhi's Court at Lamu assisted by Hon. Sheikh Abdulhalim H. Athman, P. Kadhi and Hon. Sheikh Rashid Kokunya Otundo, Kadhi)**

**JUDGEMENT**

This is an appeal from the judgement of the Kadhi in Lamu in Civil suit no. 8 of 2010. The judgement of the Kadhi was delivered on 2<sup>nd</sup> August, 2010. The grounds of appeal are that the trial court erred in law by holding that the suit property belong to the deceased, that the trial court erred in law by equating the ownership of the late Zaharia Bin Ahmed to a licence and or Ariyati gift, that there was no evidence of a gift, that the trial court erred in law and fact by holding that the appellant's house stands on the deceased land yet the respondent admitted that the house is standing on government land.

Mr. Hamza, counsel for the appellant submitted that the only evidence produced before the trial court in relation to the ownership of land was a sale agreement between one Zaharia and the appellant. There was overwhelming evidence that the appellant's house is built on government land. Ownership of government land is evidenced by possession. There was no dispute that the house was sold to the appellant by Zaharia. The trial court held that the land was gifted to Zaharia without evidence of the giver of the gift. It was purely a transaction of sale of house without land. The agreement was witnessed by the Lamu Kadhi and the area chief. The issue of Ariyat gift only came out in the judgement and is not mentioned in the evidence. The appellant was only claiming his house and there was no requirement for the deceased's relatives to give their consent for the appellant to renovate the house.

The respondent was served through his counsel but did not attend the hearing. The appeal proceeded ex-parte. The record of the trial court show that there was a succession petition filed by the respondent. The respondent informed the court that there was one Khelef Athman who was succeeded by six sons and four daughters. One of his children was Athman Khelef. The original Khelef Athman had a piece of land at Matondoni in Lamu County. And when he died the son Athman Khelef succeeded it. Athman Khelef also died and respondent took up the management of the plot. The plot is a piece of government land. The appellant wanted to build on the land and they objected. They summoned him before the chief. Although this was government land their father had owned and developed it.

PW2 ABDALLA BAKARI ABDALLA testified that he comes from Matondoni in Lamu. He knew

Khelef Athman Khelef who died over 20 years ago. Khelef Athman owned a plot which had about 10 coconut trees. One Zaharia Ahmed requested for a place to put up a house. The plots were not surveyed. PW3 AMINA ALI SHAFII is a resident of Matondoni. She is related to the respondent. She testified that Khelef Athman owned a piece of land. It had 3 coconut trees, one guava tree, one lemon tree and one mkudhumani tree. Some coconut trees were cut. Athman Khelef gave her a plot to build a house. She did not buy the plot. She still lives in the house. The appellant bought his plot from zaharia Ahmed. The house belonged to Zaharia but the piece of land belonged to Athman Khelef.

The appellant testified that he knew Khelef Athman Khelef who died about 26 years ago. He did not know if the deceased owned any property. In 1992 he bought a house without land. The land belonged to the government. He was shown the boundaries. In front of the house there were six coconut trees, one guava tree, one lemon tree and one mkudhumani tree. The seller of the house died in 1998. He bought the house for Kshs.15,000/=. He paid the entire amount but the seller who was an old lady gave him back Kshs.500/= which was meant to cater for her burial expenses in the event that she was to die. He stayed in the house peacefully until 2007. The respondent's son put some trees on his boundary. He went to report the matter to the chief.

The background to the dispute is a succession petition dated 18<sup>th</sup> June, 2010 filed by the respondent before the Kadhi's Court at Lamu. The petition was for the estate of the late Khelef Athman Khelef; the respondent's father. Paragraph 10 of the petition stated as follows: -

***The respondent is not among the survivors of the aforementioned estate but he possessed a house in the said estate which he bought from the late ZAHARIA AHMED (deceased) and the said late ZAHARIA AHMED (deceased) was gifted the said house by her late brother MZEE MANDISA (deceased). The said late MZEE MANDISA (deceased) borrowed that piece of land from the petitioner's late father KHELEF ATHMAN KHELEF (deceased) to build a temporary house for his accommodation where he built a mud and wattle house which was the same gifted to his late sister ZAHARIA AHMED (deceased).***

From the judgment of the trial court, it appears that the issue of gift came out of the above paragraph. The entire evidence did not touch on that issue. The trial court in its judgement extensively dealt with the issue of gift. The Kadhi observed that the main dispute did not involve the house but the land upon which the house stands. According to the respondent, the land belonged to Khelef Athman Khelef who later left it to his son Athman Khelef Athman. It is clear that both parties confirm that the land is still unsurveyed and it is government land.

The appellant produced before the trial court the sale agreement for the house dated 28<sup>th</sup> January, 1994. The trial court reproduced that agreement in its judgement. The agreement states as follows: -

#### **AGREEMENT**

***I, ZAHARIA BINT AHMED of Matondoni Village, Lamu District holder of identity card No. 0165735/63 hereby inform all those who are interested in knowing that I as the sole propieter of a mud and wattle house at Matondoni Village which is bordered on the North by a cemetery and on the east house of Fatuma Abdalla, on the West by house of Athman Khelef and on the south house of Fatuma Ali, I built this house by my own expenses. I have now decided by own consent without being forced by anyone and while I am in good state of my mind to sell this house to OMAR MOHAMED ALI of Matondoni Village, Lamu District at a cost of fifteen thousand shillings (Kshs.15,000/=) which I acknowledge to have already received from the buyer and have already used for personal use. The condition of this sale are: -***

- 1) That I should continue to stay in the house until such time that I die.***
- 2) That the buyer should pay the funeral and related expenses for my burial.***

***I, ZAHARIA BINT AHMED hereby make as witnesses to the sale. The sub-Chief of***

*Matondoni Mr. Abdalla Famau and Sheikh Omar Sinon.*

*Signed by the above-named:* )

**ZAHARIA BINT AHMED and** ) .....

**OMAR MOHAMED ALI** ) .....

*This 28<sup>th</sup> day of January, 1994* )

*Before me* ) **Witnesses**

) **ABDALLA FAMAU**

**ASSISTANT CHIEF**

)

..... **SHEIKH OMAR SINON**

**KADHI, LAMU DISTRICT** )

The main issue for determination is whether the above agreement involved the sale of a house without land. That question is the main issue for determination in this dispute. The concept of house without land is common in the Coast region. The fundamental element of the concept of house without land is that the owner of the land allows someone to build a house on the land on the understanding that the house owner will be paying monthly rent to the land owner. Technically speaking, it is a lease. The lessee who builds a house can at times even put up a storey building. The underlying principle is that the landowner will not be asking for his land back. In the case of **FAMAU MUNYE & 19 OTHERS V MARIAM BINTI SAID, Malindi HCCA. No. 34 of 2005**, the Court made the following observations: -

***“I have at the beginning of this judgment observed the unique features of the land tenure known as house without land and the fact that the terms in this particular instance were not reduced to writing, no matter what that arrangement is called, in my view it is a lease within the meaning of section 105 of the transfer of property Act....”***

My interpretation of the sale agreement between ZAHARIA BINT AHMAD and the appellant is that no ground rent was payable to Athman Khelef Athman or to anyone. It is also clear from the evidenced that the late Zaharia did not get the house as a gift from his late brother Mzee Mandisa as pleaded in paragraph 10 of the succession petition. Zaharia specifically indicated in the sale agreement that she built the house by her own expenses. That is sufficient proof that the house was hers and it was not a gift.

In a transaction involving the sale of a house without land, it is a common requirement that the transaction gets the consent of the land owner. Ordinarily, the sale agreement will provide for a section for the land owner to sign. The land owner will not append his signature until the seller of the house pays all pending rent and the buyer of the house agrees to pay the rent. There is a possibility that the land owner might increase the rent for the house purchaser at that particular time.

I have observed in the sale agreement that Zaharia took it upon herself to mention her surrounding neighbours. The agreement states that Zaharia’s house was bordering the house of Athman Khelef to the West. I believe this to be the same Athman Khelef who is alledged to have been the owner of the plot. What can be deduced from the agreement is that Athman Khelef was only Zaharia’s neighbour. The agreement was signed before the Kadhi and witnessed by the assistant chief. I believe if Zaharia was paying rent to Athman Khelef, the Kadhi and the Chief would have called for his presence. Further, even if there was no rent payable to Athman Khelef, assuming that Zaharia had been given the plot free of charge, Athman’s presence could still be required so that he could authorize the transaction.

It is common knowledge that some land in Lamu is not surveyed. Even if it forms part of Government land, there are people who occupy it. Once adjudication is done, the occupant of a specific portion of land is registered as the owner. In this case, zahara would have been registered as the owner of the house and as well the owner of the plot upon which the house stands. The trial court visited the property. The court was able to see the coconut, lemon, guava and mkudhumani trees. The appellant is not claiming the trees. He testified that all what he bought was the house. The only logical conclusion is that the portion covered by the trees is not part of the house. The respondents are free to utilize the trees as well as the plot where the trees are planted. It does not matter what size of land the trees occupy. All what is clear to me is that the late Ahmed Khelef had nothing to do with Zaharia's house.

The trial court seems to have deviated from the main issue and the court was of the view that the contract between Zaharia and the appellant was improper as it gave certain conditions. That was not a dispute before the court.

I do find that the trial court erred by holding that the plot upon which the appellant's house stands belong to the late Khelef Athman Khelef. The appellant is free to develop his home and even put up a permanent house without paying any rent to anyone. The succession petition before the Kadhi was not proved.

In the end, the appeal is merited and is hereby allowed. The decision of the Kadhi is hereby set aside. The disputed house belongs to the appellant who is free to develop it. Each party shall meet his own costs.

**Dated and delivered in Malindi this 11<sup>th</sup> day of October, 2016.**

**S.J. CHITEMBWE**

**JUDGE**