



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 74 OF 2007

(Being an appeal from the Ruling delivered by the Learned Kadhi Hon. Twalib B. Mohamed on 10th May, 2007 in Kadhi's Court Succession Cause No. 33 of 2005, Mombasa)

SHABAN JUMA ULAYA APPELLANT

V E R S U S

MWAJUMA JUMA ULAYARESPONDENT

JUDGMENT

1. **Mwajuma Juma Ulaya** was the Petitioner in the Succession Cause before the Kadhi Court. The Respondent before the Kadhi Court was **Shaban Juma Ulaya**. The Petitioner and the Respondent are brothers and sisters. They are both children of the late **Juma Ulaya Limwanga** (Deceased).
2. The Deceased had twelve children at the time of his death. The Petitioner in seeking an order of distribution of the Deceased Estate before the Kadhi Court joined **Shaban Juma Ulaya** as a Respondent because as she stated he as the son of the Deceased he was unwilling to initiate the Succession of their Deceased father.
3. The Kadhi Court made a partial determination on 22nd November 2006 of the distribution of the Estate of the Deceased. On that day the matter was adjourned for further representation to be made in respect of the property Msa/Block XIII/252 (**suit property**). The Ruling in regard to that property was delivered on 10th May 2007. It is that Ruling that is the subject of this appeal. The suit property is registered in the names of ABASI JUMA ULAYA, SHABAN JUMA ULAYA, ULAYA ABDALLA JUMA, ULAYA JUMA ULAYA, FATUMA JUMA ULAYA and REHEMA JUMA ULAYA.
4. The learned Kadhi in the ruling of 10th May 2007 made the following determination-

“From the foregoing the Respondent and others mentioned in the Title Deed and the Official Search are proprietors of the land Title No. Msa/Block XIII/252 under the Registered Land Act, Cap 300 but the house thereon is for Juma Ulaya Limwanga

(Deceased) as per the documentary evidence produced by the Petitioner which emanated from the transfer of the land in question. This being so, the house on Plot No. 18/88/XIII with Title No. Msa/Block XIII/252 is part of the deceased estate to be distributed to all the deceased legal heirs stated in the judgment herein. It is so ordered.”

5. Shaban Juma Ulaya has filed the present appeal and has presented the following grounds of appeal-

1. ***That Learned Trial Kadhi erred in law and in fact in failing to find that Land Parcel Title Number Mombasa/Block/XIII/252 was transferred to the Appellant by Third parties during the lifetime of the Deceased JUMA ULAYA LIMWANGA and as such the same was not part of his Estate at the time of his demise.***
2. ***The Learned Trial Kadhi erred in law and in fact in failing to find that the allegation that the said house on Plot Number MOMBASA/BLOCK XXIII 1252 belonged to the Deceased JUMA ULAYA LIMWANGA at any time in his lifetime was not proved to the required standard of proof or at all.***
3. ***The Learned Trial Kadhi erred in law and in fact in failing to find that even if the said house belonged to the Deceased at any one time, his proprietary rights thereof were irrevocably extinguished upon first registration and issuance of a Title Deed to a Third party in respect Plot Number MOMBASA/BLOCK/XIII/252.***
4. ***The Learned Trial Kadhi erred in law and in fact in failing to appreciate that the practice of ownership of house without land is inapplicable to registered land unless such interest or claim is secured in the Register in accordance with the relevant provisions of the Registered Land Act (Cap 300) Laws of Kenya.***
5. ***The Learned Trial Kadhi erred in law and in fact in failing to find that the Appellant’s rights and interest in the said parcel of land remained absolute and indefeasible in the absence of any dispute regarding ownership and/or acquisition of Plot No. MOMBASA/BLOCK/XII/252.***
6. ***The Learned Trial Kadhi erred in law and in fact in failing to find that in the absence of registration of the Respondent’s alleged interest her claim was untenable as the interest thereof is not an overriding interest.***
7. ***THAT the Learned Trial Kadhi’s findings and/or conclusions are against the weight of the evidence on record.***
6. The evidence before the Kadhi Court on behalf of the Respondent in this appeal was that the Deceased was living in his lifetime in a house on the suit property. That the Deceased was also collecting rental income of that house. Another daughter of the Deceased Miriam Juma in respect of that house said-

“The Kingorani house is for our Deceased father.”

The Respondent also produced a document written by Saleh dated 24th April 2007 which confirmed that the house on the suit property belonged to the Deceased.

7. The Appellants evidence was that the suit property was registered in the names of the six proprietors stated above in 1995. That the Deceased died on 30th June 2001. That in his lifetime the Deceased did not object to that registration. In effect the Appellant argued that the house on suit property was therefore not part of the Estate of the Deceased since the land was registered in the names stated above.
8. When the appeal was heard by me with the learned Chief Kadhi as an assessor the learned Advocate for the Appellant only argued on one ground of appeal. I shall therefore proceed to

regard the other grounds of appeal as having been abandoned.

9. What the Court is called to determine is whether the house on the suit property was part of the Estate of the Deceased. There is no dispute in regard to the ownership of the land.
10. The learned Chief Kadhi as an assessor opined in his assessment of the Appeal that the suit property should not form part of the Estate of the Deceased. I wish to reproduce part of the learned Chief Kadhi's opinion as follows-

“While the Appellant Shaban on his side denies the allegations made by his sister Mwajuma regarding Mombasa Block XIII of 252 and emphasis that the disputed block does not form part of Estate of their late father Juma Ulaya. The Appellant position is that the Kadhi’s erred his decision of 10.05.2007 by including the Mombasa Block XIII of 252 to form part of their father’s estate with the title deed of the same reads 6 names of owners of Block and not Juma Ulaya.

The above title was issued on 16.06.1995 in the names of 6 persons when the deceased Juma Ulaya was still alive and never objected to it.

My opinion on this dispute is that any property to form part of estate of any deceased should bear the name of the deceased as the owner of that property and in this case, the title deed of the disputed property does not read the name of the deceased Juma Ulaya. Instead, it reads names of 6 persons, therefore in my opinion, this property XII of 252 should not form part of the estate of late Juma Ulaya and its my opinion that the learned Kadhi erred in his findings of 11.05.2007 and the appeal should be allowed.

SHEIKH AL-MUHDHAR A. S. HUSSEIN

CHIEF KADHI”

11. It is clear even in the Respondent's submission before us that the Respondent seeks that the house be regarded as part of the Deceased's Estate and be subjected to distribution amongst the beneficiaries. The Respondent in her submissions and in relation to the house stated-

“We have lived in that house the house belonged to our father (Deceased)”

12. The fact that the Deceased lived on the subject house and he also collected rent from that house in his lifetime was not controverted by the Appellant. To determine whether the house is capable of being inherited by the beneficiaries of the Deceased Estate one has to determine whether the house is part of the land. This is a novel area of the law, but it is not the first time that it has been considered by the Courts. In my research I have come across various cases where the Courts have upheld the right to own a house without land. Just to give an indication of those cases I will proceed to reproduce them as follows-

SAMUEL NJUGUNA KIMEMIA v ROSE MGENI MTWANA MBSA COMM. NO. 56 OF 2009 where it was stated-

“Every Judge on his first posting in Mombasa, is instantly confronted by an unnerving legal situation unknown in all his years of learning. She or he has been schooled in the Common Law traditions and land tenure systems that declared the principle:

‘cujus est solem ejus et usque ad coelum et ad inferos’

(to whomsoever the soil belongs, he owns to the sky and the depths below to an indefinite extent)

Upon this principle, the country's substantive land law and registration systems are based. The jurist in Mombasa is, however, ambushed by a land system or phenomenon in the Coast known as:

'Ownership of house without land'

Judicial notice has long been taken of this strange system in the Coast, and there is substantial case law on it. But scholarship and legislation have lagged behind. This case is about a dispute relating to a property under the 'house without land' system."

AWEOHA MOHAMED SAID & ANOTHER v KHADIJA ABEID JUMA (2005)eKLR the Court held-

"The second and main ground of appeal was to the effect aht the learned Kadhi erred in holding that the house without land at Mkunumbi belonged to the Respondent and not the Deceased and thus excluded it from the properties left by the deceased for distribution. The second Appellant contended both before the Kadhi's Court and in this appeal that if the house without land at Mkunumbi belongs to the Respondent then the permanent house at Sargoi in Mombasa should be held as belonging to her as she also built it with the assistance of the Deceased. Messrs Twalib B. Mohammed, the Kadhi of Mombasa and Abdulrahim H. Athman the Kadhi of Kwale, who sat with me as assessors in this appeal both concurred with the trial Kadhi that on the basis of the evidence placed before him, the trial Kadhi was right in holding that the house at Mkunumbi belonged to the Respondent."

FAMAU MWENYE & 19 OTHERS –VS- MARIAM BINTI SAID MALINDI HCC NO. 34 OF 2005 the Court stated-

"I have, at the beginning of this judgment, observed the unique features of this land tenure known as 'House without land' and the fact that the terms in this particular instance were not reduced into 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 (the Act) which defines a lease...."

MSHINGO –VS- KADOGO CIVIL SUIT NO. 82 OF 1997 the Court

held-

"The phenomenon known as 'house without land' in Mombasa is so notorious that it has virtually been accorded judicial notice although it flies in the face of written law."

SALIM & ANOTHER -VS- MOHAMED KLR (E&L)1 the Court stated-

"This case arises partly because of a peculiar land tenure phenomenon known only in Mombasa as 'House without land' defies the existing definitions of land in our laws but because of its notoriety the courts have been forced to give it some measure of judicial notice. It has thus been recognized in various decisions that one may legitimately own a house temporary or permanent, constructed on land owned by another person. I think the current initiatives, towards reform of our land laws must come to terms with such phenomenon."

TEMO & 6 OTHERS –VS- SWALEH [2002]I KLR the Court stated-

"The Land Titles Act (Cap 282) under which the land was registered applied to this case. Since that Act recognized the peculiar phenomenon of 'houses without land', which the court took judicial notice of, the residential structures and commercial plants on the portions occupied by the Plaintiffs, which ordinarily would by definition go with

the land, belong to the Plaintiffs and reasonable compensation should be paid to them.”

13. My finding therefore is that even if the suit property is registered in the names stated above, the Deceased was entitled to the occupation and possession of the house without the land. It would seem that even during the Deceased lifetime the house and the land were divisible. It is for that reason that I beg to differ with the opinion of the learned Chief Kadhi. It is also for that reason that I find the Ruling of the Kadhi of 10th May 2007 cannot be faulted and accordingly this appeal is dismissed with costs therefore being awarded to the Respondent.

Dated and delivered at Mombasa this 21st day of November, 2013.

MARY KASANGO

JUDGE