



**Katana Simon Tsuma ((Administrator of the Estate of Kazuri Wanje Ziro)) v Omar (Environment and Land Case Civil Suit 143 of 2015) [2022] KEELC 3668 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3668 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 143 OF 2015**

**MAO ODENY, J**

**JUNE 24, 2022**

**BETWEEN**

**KATANA SIMON TSUMA ..... PLAINTIFF  
(ADMINISTRATOR OF THE ESTATE OF KAZURI WANJE ZIRO)**

**AND**

**SAID SALIM OMAR ..... DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated December 5, 2019 the plaintiff herein sued the defendant seeking the following orders:
  - a. Specific performance.
  - b. Costs of the suit.
  - c. Any other relief that the court may deem just and expedient.
2. The defendant filed a defence and counter claim dated October 12, 2015.

**PLAINTIFF'S CASE**

3. PW1 adopted his statement dated May 3, 2018 and the list of documents filed in court on August 17, 2015 and a supplementary list of documents dated September 3, 2018 respectively as exhibits before the court. It was his evidence that he was the administrator of the Estate of Kazuri Ziro.
4. PW1 also stated that his mother was paralyzed and was on a wheel chair. He also stated that it is not true that she sold the suit land to the defendant as the defendant was a tenant. PW1 further stated that he lives on Plot No 135 Kalolo Kibokoni Bayamagonzi Upgrading Project Scheme situate at Kilifi-



Charo Wamae Road where his mother built a house on the parcel of land and had shops at the front which rented to allow her earn money for self-sustenance.

5. He also told the court that his mother entered into a tenancy agreement with the defendant whereby the defendant rented one of the shop premises where he set up a butchery at a monthly rent of Kshs 20,000/- from May 4, 2010 but the defendant failed to submit a single rental payment to the plaintiff and later claimed that the plaintiff had sold the land to him.
6. It was PW1's testimony that the defendant forged documents showing his allegations that he had bought the property which matter was reported to the police. Further that if the property had been sold to the defendant he could have been listed as an owner in the records of Kalolo Kibokoni Bayamagonzi Upgrading Project which records still shows his mother as the owner.
7. Upon cross examination by Mr Odhiambo, he stated that the defendant had been charged in court together with Mcharo and Paul Karisa Kahindi. He also stated that it was not true that the defendant was not found guilty due to lack of witnesses. He urged the court to grant orders as prayed in the plaint.

#### **DEFENCE CASE.**

8. DW1 adopted his statement and denied the contents of the Plaint and sated that the Plaintiff sold him parcel of land known as Plot No 135 Kalolo Kibaoni Bayamagonzi Project *vide* an agreement dated July 20, 2010.
9. It was his evidence that sometime in November 12, 2009 he became the plaintiff's tenant when he occupied her premises on Plot No 135 Kalolo Kibaoni Bayamagonzi Upgrading Project within Kilifi County paying rent of Kshs 20,000/- per month. That the premises were in a bad state and the Plaintiff allowed him to renovate the same at a cost of Kshs 1,074,644/-.
10. He told the court that the plaintiff was not a witness to the agreement and that he was charged with making false documents without authority but he was acquitted of the case. He also told the court that he bought an old house on a plot but he did not complete payment of the purchase price.
11. DW1 further stated that they had an arrangement on how he was to recover the amount spent on renovation which agreement was signed on May 4, 2010 and that he entered into a written agreement for sale of a portion of Plot No 135 at a consideration of Kshs 2,100,000/- which agreement was signed and witnessed. It was his testimony that the portion of the plot sold to him had a shop from which he had been operating his business and the Plaintiff was to remain in occupation of the house behind the said butchery. That the Plaintiff acknowledged receipt of the sum of Kshs 1,074,644/- which was the amount spent to renovate the premises.
12. DW1 stated that he has sued the plaintiff for specific performance of the term of the agreement and a permanent injunction against the plaintiff and her employees or agents or servants from interfering with the defendant's peaceful occupation, possession and use of the said parcel of land.
13. DW1 also sued for an alternatively order that the Plaintiff refunds the market value of the parcel of land together with damages for breach of contract.
14. On cross examination, he told the court that the money was for renovation of which he neither gave the Plaintiff cash nor brought the receipts as proof.
15. DW1 also stated that they did not write a letter to the Land Committee they had not reached the transfer stage as he had not completed payment.



## **PLAINTIFF'S SUBMISSIONS**

16. Counsel reiterated the evidence of the plaintiff and submitted that at the time of entering the alleged agreements, the plaintiff's mother was ailing and wheel chair bound raising doubts as to how she could have executed the alleged transaction.
17. Mr Mwadilo further submitted that lack of consents to the transaction by the family of the deceased and the Land Control Board renders the transaction null ab initio. Further that the fact that the officials of Kalolo Kibaoni Bayamagonzi Upgrading Project still recognized the original Plaintiff as the proprietor of Plot No 135 is a clear indication that the transaction is not recognized and if it was true that he had purchased the plot from the plaintiff, the defendant would have strived to have the records changed accordingly.
18. Finally, he submitted that the plaintiff has proved the claim herein on a balance of probabilities and that the defendant has failed in his defense and counterclaim. He urged the court to enter judgment for the plaintiff as claimed in the plaint and dismiss the defendant's counter claim.

## **DEFENDANT'S SUBMISSIONS.**

19. Counsel for the defendant identified two issues for determination; as to whether the defendant is a tenant of the Plaintiff and therefore obligated to pay Kshs 600,000/- and whether the defendant purchased a portion of the plot where he constructed a building where he carries his business.
20. On the first issue, counsel submitted that the Defendant was a tenant before the deceased and the defendant executed an agreement for sale dated July 20, 2010.
21. On the issue as to whether the plaintiff sold to the defendant a portion of the plot, counsel submitted that there is evidence that the defendant bought a portion of land from the deceased leaving a balance of Kshs 600,000/- which sum is not for rent arrears. He submitted that he was indeed charged in a criminal court in respect of the sale agreement but was acquitted for lack of evidence and that the defendant having been acquitted in the criminal case, the plaintiff is estopped from denying existence of the agreement.
22. Counsel urged the court to dismiss the plaintiff's claim and allow the defendant's counterclaim with costs.

## **ANALYSIS AND DETERMINATION.**

23. The issues for determination are as to whether the defendant was a tenant or whether he bought the suit land from the plaintiff.
24. It is not in dispute that the plaintiff is the owner of the suit land and premises. It is further not in dispute that the relationship between defendant and the plaintiff was that of landlord/tenant and the same is acknowledged by the defendant.
25. The defendant was to pay a monthly rent of Kshs 20,000/ which amount the defendant never paid claiming that they had entered into an arrangement to renovate the premises and that Kshs 10,000/ was to be deducted towards the expenses incurred. There was no evidence of payments of receipts to show how much the defendant used for renovations if any and the agreement that the defendant relied on was subject to a criminal case for forgery or altering false document.
26. It is on record that vide a letter dated August 3, 2015 the Chairman of the Kibaoni Kalolo Bayamongozi Project indicated that the owner of the suit plot was Kazuri Wanje Ziro and he did not have any records



showing that the plot was transferred to someone else. Had the defendant bought the plot as claimed, he would have ensured that the records indicated that he was indeed the owner. The defendant also admitted that he did not pay the purported full purchase price hence the transaction had not reached the transfer stage.

27. It is not disputed that the plaintiff and the defendant had agreed on the arrangement for renovation in lieu of part payment of rent which was to be implemented by the defendant. I find that the defendant has not fulfilled his part of the bargain as per the contract to honor the terms of the contract and damages.
28. I therefore find that the plaintiff is entitled to the rent arrears plus interest at court rates until payment in full together with costs of the suit. The defendant has failed to prove his counterclaim and is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

