



Sahib & 4 others (All Suing as the Nominees Appointed by His Holiness Dr Mufaddal Saiffudin, The Registered Trustee for and on Behalf of Dawat E Hudiyah, Registered Trustee for and on Behalf of the Bohra Community in Lamu) v Mohamed; Mohamed (Plaintiff to the Counterclaim); Sahib & 4 others (All Being Sued as the Nominees Appointed by His Holiness Dr Mufaddal Saiffudin, The Registered Trustee for and on Behalf of Dawat E Hudiyah, Registered Trustee For And on Behalf of the Bohra Community in Lamu) & another (Defendant to the Counterclaim) (Environment & Land Case 29 of 2016) [2025] KEELC 3225 (KLR) (7 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3225 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 29 OF 2016
FM NJOROGE, J
APRIL 7, 2025

BETWEEN

AMEL SAHIB & 4 OTHERS & 4 OTHERS & 4 OTHERS PLAINTIFF
ALL SUING AS THE NOMINEES APPOINTED BY HIS HOLINESS DR
MUFADDAL SAIFFUDIN, THE REGISTERED TRUSTEE FOR AND ON
BEHALF OF DAWAT E HUDIYAH, REGISTERED TRUSTEE FOR AND ON
BEHALF OF THE BOHRA COMMUNITY IN LAMU

AND

MOHAMED ALI MOHAMED DEFENDANT

AND

MOHAMED ALI MOHAMED PLAINTIFF TO THE COUNTERCLAIM

AND

AMEL SAHIB & 4 OTHERS (ALL BEING SUED AS THE NOMINEES
APPOINTED BY HIS HOLINESS DR MUFADDAL SAIFFUDIN, THE
REGISTERED TRUSTEE FOR AND ON BEHALF OF DAWAT E HUDIYAH,
REGISTERED TRUSTEE FOR AND ON BEHALF OF THE BOHRA
COMMUNITY IN LAMU) DEFENDANT TO THE COUNTERCLAIM
SHABBER ALI ISMAIL IBRAHIMJEE DEFENDANT TO THE
COUNTERCLAIM



JUDGMENT

1. The plaintiffs in this case have brought the suit on behalf of the Bohra Community in Lamu against the defendant for the following orders:
 - a. Vacant possession of the suit property
 - b. Permanent injunction restricting the defendant from constructing on the suit property or any manner dealing with the same
 - c. General damages for denial of use of property
 - d. Any other orders as this honorable Court may deem fit to grant.
2. From my reading of the plaint, the plaintiffs sued the defendant on behalf of the Bohra Community. They state that the defendant was given possession of the property without the consent of the plaintiff by one Shabbir Ismail Ibrahimjee to whom they had leased the suit property. They only realize that there was a sub-lease when the defendant began to effect developments on the suit property. They then protested against the development by raising a complaint with the County Council of Lamu. However, the development continued despite their protestations.
3. They narrated that they proceeded to court for a permanent injunctive order in Malindi CMC Number 178 of 2010 but the decision therein was subsequently quashed in a Judicial Review Malindi HCC JR MISC Application Number 61 of 2011 for the reason that the lower Court lacked jurisdiction to hear and determine the case. Meanwhile, Shabbir who allowed the defendant into the premises and under whom the defendant claims to be a sub-tenant, has already relinquished the tenancy existing between him and the plaintiffs. The plaintiffs aver that any transactions between Shabbir and the defendant should be treated as null and void from the date of expiry of Shabbir's tenancy.
4. The plaintiffs aver that they have never accepted any rent or any kind of payment pertaining to the suit property from the defendant, or in any manner condoned the defendant's occupation of the property but the defendant is still in occupation of the property and he is still proceeding with development thereon. They now claim against the defendant for trespass on their property.

Defence

5. The defendant filed an amended statement of defense and counterclaim on 16th September 2022. He objected to the locus standi of the plaintiffs on the basis that they had not obtained a Grant of Letters of administration to the estate of Sakinabhai Binti Ibrahimjee. The second technical objection was that the plaintiffs have not demonstrated that they are the head members of the Bohra Community in Lamu. While denying any privity of contract between him and the plaintiffs, the defendant contends that the sub-lease between him and Shabbir did not require any consent of the plaintiffs, that his development on the suit land were approved by the Lamu County Council; that the suit is res judicata Malindi CMC 178 Of 2010; that the handing over of the property has never been communicated to the defendant to date; so the plaintiffs are not entitled to receive any rents or any form of payment from the defendant and that he has not committed any trespass.

Counterclaim

6. The counterclaim is improperly intituled. Instead of depicting himself as the plaintiff in the counterclaims Mohamed Ali Mohamed has called himself the 1st defendant and named Shabber



Ali Ismail as the second defendant while the plaintiffs in the main suit remain the plaintiff in the counterclaim. This court will overlook that inadvertence on the part of counsel for the defendant. It is hereby amended to read as follows:

“Mohamed Ali Mohamed Plaintiff
Versus
Amel Sahib and 4 Others
(All being sued as the Nominees Appointed by His Holiness
Dr Mufaddal Saiffudin, The Registered Trustee for and on Behalf
of Dawat E Hudiyah, Registered Trustee for and on Behalf
of The Bohra Community in Lamu)1st -4th Defendants
Shabber Ali Ismail Ibrahimjee5th Defendant”

7. However, for good order, the other parties will retain their descriptions as either “plaintiffs” or “defendant” in the main suit while the new party Shabber Ali Ismail Ibrahimjee will be referred to as the “5th defendant” throughout this judgment.
8. The counterclaim reiterated the contents of the defence and added as follows: that on or about 26th July 2004, the defendant and Shabber Ali Ismail, the 5th defendant to the counterclaim, executed a sub-lease of the premises on the suit land.
9. One of the terms of the contract was that the defendant was to build a storey building on the premises and the 5th defendant was to take actual possession and occupation of the upper floor while the defendant took possession and occupation of the ground floor.
10. Thereafter the defendant constructed the building as agreed and the 5th defendant took possession of the upper floor while the defendant occupied the ground floor. There was no termination clause in the said contract.
11. The defendant further avers that the 5th defendant never informed him of the need for consent and/or authority from the plaintiffs for the construction. He admits that he has never entered into any contract with the plaintiffs. He avers that he has been paying rates to the County Government of Lamu. He claims against the 5th defendant for indemnity in respect of the claim by the plaintiffs. He seeks the following reliefs:
 - a. An order be issued idemnify the 1st defendant from any claims from the plaintiffs and/or any other person;
 - b. An order of permanent injunction restraining the plaintiffs and or any other person acting on their behalf from interfering in any manner with his occupation of the suit premises;
 - c. Costs and interest of the counterclaim.

Defence to Counterclaim.

12. The 5th defendant filed the above pleading on 17th February 2023 through K. Lughanje and Company Advocates. He admitted to having leased the suit property from the plaintiffs on 1st January 1987 and added that he later embarked on construction of a building on the suit premises to host a restaurant



but the restaurant burnt down and he became financially crippled and was unable to reconstruct the building.

13. He denied that there was any sub-lease whatsoever between him and the defendant. He states that it is the defendant who approached him with an offer construct the entire building to comprise of two floors, and occupy the ground floor while the 5th defendant would occupy the 2nd floor. The defendant however constructed the ground floor and occupied it and occupied the same but he also breached their contract by failing to complete the first floor, thereby leaving 5th defendant destitute despite being the lawful of lessee the suit property; that the defendant frustrated their contract from inception by forcefully taking possession of the ground floor and failing to complete the 1st floor and so by virtue of that breach, the defendant cannot claim in court for enforcement of the contract between them. He states that the 1st floor stands incomplete to date. He also states that he informed the defendant that he was a mere lessee of the property and not the owner, having leased the property of the plaintiffs; that in 2009 his lease with the plaintiffs was terminated and he departed from Lamu for Mombasa where he currently lives. He therefore states that the defendant does not deserve orders such as those sought in the counterclaim.

Evidence of The Parties

Plaintiff's Evidence

14. PW1 testified 7th March 2024 and adopted his written witness statement dated 17th February 2016 and produced documents. His evidence rhymed with the contents of the plaint. His evidence is that he is one of the nominees nominated by the head of the Bohra Community to look after the welfare and the properties in Lamu on behalf of the Bohra Community. The suit land was consecrated as waqf property for the benefit of the Bohra Community in Lamu by the late Sakinabhai Binti Ibrahimjee. The beneficiary of the trust is the Bohra Community of Lamu. It was the 5th defendant who without the knowledge of the plaintiffs sublet it to the defendant. The tenant, Shabbir Ismail Ibrahimjee, the 5th defendant herein, has relinquished the tenancy that had been subsisting between him and the plaintiffs by issuing the plaintiff with a handing over of property notice dated 22nd February 2009, in effect handing over the property to the plaintiffs with effect from 31st December 2009 and undertaking that any liability for transactions between the 5th defendant and any third party made during the subsistence of the lease will be the responsibility of the 5th defendant. They had informed the 5th defendant that he cannot sublease the land.
15. On cross-examination, he stated that the plaintiffs were not aware of the agreement between the 5th defendant and the defendant. He admitted that the 5th defendant did not show them any document canceling the sub-lease. He stated that they had stopped the defendant from constructing as far back as 28th January 2009. He and his co-plaintiffs were not aware that the defendant used to pay rates for the property. On cross-examination by Ms Achieng, he admitted that the building has no 1st floor.
16. Upon re-examination by Mr Hassan, he admitted that one side of the building is occupied by the Bohra Community while the other side which is the rear, away from the beach, is occupied by the defendant.

Defendant's Evidence

17. DW1 testified on 25th September 2024 and adopted his witness treatment dated 15th September 2022. He admitted having built on the suit land where he runs a clothes and shoes shop. He admitted that he got the suit premises from the 5th defendant. At first he wanted to buy the house but the 5th defendant stated that he cannot sell the same to him since he did not have alternative business



- premises. The two therefore agreed that he builds a house and he occupies the ground floor while the 5th defendant occupies the first floor. Their agreement was executed at Kamoti and Company Advocates 7th February 2005. Another agreement was written on 26th July 2004. Subsequently he commenced the construction project but the Bohra Community came and told him that he had no permission to build on the premises. He had witnessed the 5th defendant develop the place before him. He stated that Shabber has been there for 24 years and he never informed him of his surrender of the land back to the Bohra Community. He paid land rates for the premises to the County Government of Lamu.
18. Upon cross-examination by Ms Achieng, he conceded that only the ground floor is complete. The reason why he has not completed building the top floor as agreed between him and the 5th defendant is that in 2005, the first defendant informed him that the premises are not his. He admitted that he does not pay the 5th defendant any rent.
 19. Upon cross-examination by Mr Hassan, he stated that he has never met Sakina and that Sakina never left the suit property to him. He conceded that the land does not belong to either the 5th defendant or himself. He reiterated that he bought his hotel from the 5th defendant. He maintained that the Bohra Community did not own the house.
 20. Upon re-examination by Ms Rutto he stated that his agreements with the fifth defendant provided for no timelines or payment; that he knew that the land was not the 5th defendants but Sakina's.
 21. DW2 Shabberali Ismail testified and adopted his witness statement dated 30th March 2024 as his evidence-in-chief and produced documents. His evidence is that the defendant never complied with the agreement between them and he had to leave Lamu since he had no income. He prayed for the counterclaim to be dismissed.
 22. Upon cross-examination by Miss Rutto he stated that in 2009, he informed the defendant verbally that he had surrendered the premises to the plaintiffs, but he never wrote him a letter to that effect. He has never reminded the defendant to complete the top floor. He stated that while giving the premises to the defendant in the year 2004, he informed him that the premises were not his. The Bohra Community was in Lamu as at that time but he never informed them that he had given the premises to the defendant. They have not also ever sued him over the sublease to the defendant. He admitted he had lived on the land for 24 years and was paying rent to the Bohra Community. In his agreement with the defendant, it has been agreed that he would be paid rent but no timelines were given.
 23. On cross-examination by Mr. Hassan, he admitted to having been paying rent to the Bohra Community on a monthly basis. However, he and the defendant never involved the Bohra Community in their agreement. He admitted that the rent referred to in the agreement with the defendant was the rent to the Bohra Community in Lamu.
 24. Upon re-examination by Ms Achieng, he stated that during his days on the land the Bohra Community never interfered with his occupation thereof, and that there was no written agreement between him and the Bohra Community regarding the premises. According to him he had never undertaken to compensate the defendant for any loss.

Submissions of The Parties

25. All the parties in this case filed their final submissions which I have considered in the preparation of this judgment.



Analysis and Determination

26. It is agreed among all the parties that the 5th defendant was granted possession of the suit premises by the plaintiffs without a written tenancy agreement, and that he subsequently granted possession of the suit premises to the defendant by virtue of a written agreement between them, and that there is no privity of contract between the defendant and the plaintiffs.
27. The following issues arise for determination:
 - a. Whether the 5th defendant had capacity to enter into the sort of agreement he did with the defendant in respect of the suit premises;
 - b. Whether with the surrender of the suit premises to the plaintiffs the agreement in favor of the defendant was terminated automatically;
 - c. Whether the defendant was entitled to indemnity from the fifth defendant upon termination of the agreement between them;
 - d. Who should meet the cost of this suit and the counter claim;

The issues are determined as here in below.

28. The issue of challenge to title by the defendant must be handled first but only within the context of the present case, and since validity title is not the main gist of this case this judgment should not be seen as validating the plaintiff's claim to title as against all the world.
29. The plaintiffs assert that they are a mere trustee for the Bohra Community, that the Bohra Community leased the premises the 5th defendant. The 5th defendant admits that the land was leased to him by the plaintiffs and that he entered into an agreement with the defendant.
30. The suit premises belong to a person called Sakinabhai. There is a certificate of ownership that has been produced by the plaintiffs in the name of Sakinabhai Binti Ibrahimjee. It appears that by virtue of entry number 2 on that certificate of ownership she consecrated the plot for a waqf subject to the terms and conditions of a particular waqf deed, and transferred to herself the plot as the first trustee. The same details on entry number 2 are also reflected on the Certificate of Official Search dated 17 November 2008 which is a part of the plaintiffs' documents. It would appear that in 1997 a title deed was issued in her name under the Registered *Land Act*. However, no copy of search Title Deed has been exhibited by the plaintiffs but the waqf deed has been exhibited. However, the defendant has exhibited a copy of the title deed that seems to be missing from among the plaintiff's documents, against which a restriction claiming his rights as a licensee has been lodged.
31. Under Clause 3 of the waqf deed, it is provided that after the death of Sakinabhai, the trustee of the waqf property shall be Dai Sayedina Taher Seffudin or his nominee or any respectable member of the Daudi Bohra Community of Lamu. "Dai" appears to be the title of the Bohras' leader. The plaintiffs have exhibited a directive by the 53rd Dai dated 21st October 2014, apparently validating their appointment by the 52nd Dai as members of what is referred to as Anjuman-e- Vajihi, Lamu for a time ending on 30th June 2017 in accordance with the provisions of their Constitution.
32. I have examined the evidence of the defendant and his submissions and I find that despite his pleadings, there is no serious evidence in this particular case challenging the plaintiffs' locus, either to the administration of the waqf property or to bring the present action. This court therefore finds that the plaintiffs had capacity to grant possession to the 5th defendant.



33. Turning to the nature of the agreement between the defendant and the 5th defendant, it is the case that although it is agreed that there was no written lease agreement between the plaintiffs and the 5th defendant, it is also not in dispute that the 5th defendant used to pay rent to the plaintiffs on a monthly basis. That rendered the 5th defendant to be a tenant of the plaintiffs from month to month and in that capacity he entered into an agreement between himself and the defendant. The agreement he entered into with the defendant however defies description as a lease agreement. It allowed the defendant to develop the premises extensively. Though it provided for sharing of the rent payable, presumably to the plaintiffs, no such rent was ever paid. Indeed, the failure to categorize whether the rent was the kind of rent due to the government or to the plaintiffs rendered the issue unclear and the defendant may be forgiven for believing that the 5th defendant, whom he had seen on the premises for 24 years was the real owner. However, that belief dissolves into immateriality in the face of first, the fact that the agreement hints that the 5th defendant had leased the property from someone, and second, the fact that it is for every person intent on acquiring an interest in land to do a due diligence which would have disclosed that the 5th defendant held no registered interest in the property.
34. It was for the defendant and the 5th defendant to demonstrate that the 5th defendant had capacity to enter into the kind of agreement at the two entered into, for without capacity then that agreement is null and void.
35. As both plaintiffs and the 5th defendant agree that their lease agreement was oral, no such term permitting a sublease of the sort of agreement the defendant and the 5th defendant entered into, can be imputed into it.
36. The agreement dated 26th July 2004 between the 5th defendant and the defendant purported to give a portion of the premises to the defendant absolutely and without conditions save that he would bear a portion of unspecified rent and also allow the 5th defendant to utilize the first floor as soon as he had completed the construction works.
37. The case herein is quite distinguishable from the one in *Sunil Vinayak v Santokh Singh Mool Singh & 2 others* [2017] [2017] KEELC 3091 (KLR) cited by the plaintiffs where there was express admission that the premises were sub-let, and that the plaintiff being the tenant was receiving rent from the subtenants and also sharing the profits of his dental practice located on the same premises with the landlords.
38. In the case of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] KECA 319 (KLR) it was held as follows:
- “ 36. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See *Black’s Law Dictionary*, 9th Edition, Gardner, Ed.).”
39. Such terms were extremely onerous upon the 5th defendant not only for the reason that he had no recourse if the defendant failed, as it happened in this case, to avail the 1st floor for his occupation, but also that he was completely excluded from the property; they were also onerous upon the plaintiffs who were the managers of the property and the cestui que trust who, out of no doing of their own,



would be indefinitely deprived of the premises and be compelled to remain with a tenant not only not of their own choice, but one who was not obliged to pay any rent to them.

40. This court is thus not persuaded that such terms as would dispose of an absolute or unlimited interest in the property, can be presumed into an oral lease such as that between the plaintiffs and the 5th defendant.
41. As to as whether upon the surrender of the suit premises to the plaintiffs the agreement in favor of the defendant was terminated automatically, this court thinks so.
42. The very first ground on which a positive answer to that question is hinged is that the plaintiffs and the defendant agree that there is no privity of contract between them. Upon the removal of the only bond by which they were linked, that is, the lease between the plaintiffs and the 5th defendant, nothing was left between the two upon which the defendant could prolong his occupation of the suit premises.
43. That fact is emphasized by the concession that no consideration in terms of money or otherwise was paid by the defendant to be 5th defendant as rent for the premises; also, no money is being paid by the 5th defendant to the plaintiffs, their lease agreement having been terminated. Such payment if it had been proved would have rendered this a deeper and more complex discourse than it is now.
44. However, in the present case, it has been found that the 5th defendant had no authority to enter into the agreement he did with the defendant. Under the doctrine of *nemo dat quod non habet* that agreement granted the defendant zero rights and he ranks worse than a sub-lessee. Nevertheless, his presence on the suit land depended solely on the oral lease between the plaintiffs and the 5th defendant and to that extent, the principle in *Sunil Vinayak (supra)* applies, to the extent that his rights to be on the suit premises if any expired upon the surrender by the 5th defendant of his lease back to the plaintiffs.
45. It is therefore clear as day that the defendant is occupying the premises free of charge, an untenable situation in view of the fact that he neither has any registered interest thereon and nor is he accountable for any rent to the plaintiffs who have right to administer the suit land. In the circumstances, this court finds that the defendant became a trespasser on the suit land the moment the 5th defendant surrendered his lease back to the plaintiffs.
46. Regarding whether the defendant was entitled to indemnity from the 5th defendant upon termination of the agreement between them the answer lies in their two written agreements. As none of them reflect that sort of clause, this court, following in the footsteps of the Court of Appeal in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999*. In that case the court held that it is not for the Court to rewrite a contract for the parties, stating as follows: “...a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”
47. The defendant is thus not entitled to any indemnity from the 5th defendant.
48. The outcome of the foregoing analysis is that the plaintiffs’ suit has merit while the counterclaim lacks merit. I therefore dismiss the defendants’ counterclaim and enter judgment in favor of a plaintiffs against the defendant in terms of prayers number I and II in the plaint. General damages are not awarded as none were proved by evidence from the plaintiffs.
49. As to who is to meet the cost of this suit and the counterclaim, after circumspection on the circumstances of the case, I order that each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 7TH DAY OF APRIL 2025.

MWANGI NJOROGE



JUDGE, ELC, MALINDI.

