



**Suleiman (Suing as a legal representative of the estate of Ibrahim Suleiman (Deceased)) v Reje (Environment & Land Case 50 of 2021) [2022] KEELC 15210 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15210 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 50 OF 2021  
SM KIBUNJA, J  
DECEMBER 7, 2022**

**BETWEEN**

**FATUMA IBRAHIM SULEIMAN ..... APPELLANT  
SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF IBRAHIM  
SULEIMAN (DECEASED)**

**AND**

**ISMAIL FUNDI REJE ..... RESPONDENT**

*(Being an appeal arising from the judgement of Hon. G. Kiage, Senior Resident Magistrate, delivered on the 19th August 2021 in Mombasa CM ELC 88 Of 2019)*

**JUDGMENT**

1. The appellant preferred this appeal against the whole judgement through the memorandum of appeal dated the August 24, 2021, raising five (5) grounds. The grounds are that the trial magistrate erred in law and fact by finding that the appellant had not proved ownership of the house without land; that the trial magistrate erred in law by failing to properly evaluate the evidence before the court and thereby arrived at a wrong conclusion; that the trial magistrate erred in law and fact by failing to appreciate the Islamic Law of inheritance produced before the court; that the trial magistrate erred in law and fact by finding that the appellant had not proved her case despite there being no defence witness tendered; and that the trial magistrate erred in law and fact by considering non related factors in favour of the defence who did not testify and thereby occasioned miscarriage of justice. The appellant therefore prays for the appeal to be allowed, judgement of the trial court delivered on the August 19, 2021 to be set aside, judgement be entered in favour of the appellant as prayed in the plaint and costs.
2. Upon being served with the record of appeal, the respondent filed the memorandum of cross appeal dated the August 30, 2021 raising five (5) grounds, summarized as follows; that the learned magistrate



erred in law and fact by finding that there was no evidence tendered by the respondent; that the learned trial magistrate was wrong to ignore the evidence of one Mwanaisha Seif; the learned magistrate erred in his decision on who can testify in a matter to prove or disapprove a fact; that the trial magistrate erred and misdirected himself by equating testimony and weight of evidence; and the trial magistrate erred in ignoring the site visit and importance of building plan, which facts would have led to a different finding on the respondent's case. The respondent prays for the lower court's order dismissing the suit to be confirmed, cross appeal on the defendant's evidence and documents tendered to be allowed with costs in this court and the lower court.

3. The court issued directions on the July 12, 2022 on filing and exchanging submissions. The learned counsel for the appellant filed their submissions dated the August 22, 2022 and further submissions dated the September 13, 2022, while that for the respondent filed theirs dated the August 24, 2022, which the court has given due considerations.
4. The following are the issues for the court's determinations;
  - i. Whether the learned trial magistrate erred in finding that the appellant had not proved ownership of the house in dispute.
  - ii. Whether the learned trial magistrate misdirected himself on the place of Islamic inheritance law in the dispute.
  - iii. Whether the learned trial magistrate considered extraneous facts, and failed to consider relevant ones in arriving at his decision.
  - iv. Which prayer(s) to grant in the appeal and or cross appeal.
5. The court has carefully considered the grounds on the appeal and cross appeal, the submissions by the learned counsel, the record of appeal and come to the following conclusions;
  - a. To start with, it's important to restate the court's obligation or duty as was set out in the case of *Selle & another v Associated Motor Boat Company Limited* [1968]1 EA 123, cited in [David Oteba Ooko v Peter Joe Emorgor \[2020\] eKLR](#), 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 failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence.'

Also, in the case of [Mwangi v Wambugu \[1984\] KLR 453](#), it was held that the appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to the evidence.
  - b. The suit in the lower court was commenced by the appellant as the plaintiff, through the plaint dated the April 8, 2019 in which she sought *inter alia* for declaration that she is the rightful owner of the house; an order for the defendant (respondent) to account for rent collected; order to stop further collecting of rent and costs. The claim was opposed by the respondent vide his statement of defence dated the July 12, 2019, among others averring that the house in dispute belonged to his late sister, Amina Ibrahim Radu, and was not part of the estate



of the late Ibrahim Suleiman. At the hearing, the appellant testified as PW1 and adopted the contents of her witness statement dated the April 8, 2019 as part of her evidence in chief. She told the trial court that the house in dispute belonged to her late father, and the defendant, who is a step brother to her mother want to deny her rightful inheritance by claiming it. During cross examination, PW1 testified that the house was built by her late father and not by Amina. She disputed the contents of the letter dated the February 5, 2019 to the effect that the house belonged to Amina Ibrahim Randu, and termed the building plan presented by the defendant as being not genuine. She appointed out that the house her late father built was different from the building plan as he had made some changes during the construction stage. She finished her testimony by stating that she was the one who has been paying the ground rent from the time her mother passed on. For the defence, Mwanaisha Seif testified as DW1. She told the court that the defendant was her grandfather and was sickly. That the said grandfather was brother to the late Amina Ibrahim, who was wife to the late Ibrahim Suleiman. It was her testimony that the house in dispute was built by Amina, with whom she had lived with from the time she was young. She produced receipts for purchase of construction materials, building plan dated October 12, 1988 and letter dated February 5, 2019 as exhibits. She further stated that the plaintiff never lived in the disputed house, and it did not belong to the father of the plaintiff. That she is the one who has been paying the ground rent and taking care of the house. During cross examination, DW1 conceded that she had not availed receipts for payment of ground rent for the house. That though the receipts the plaintiff had were in the name of the plaintiff's father, it was not evidence that the house in dispute belonged to him. That the land on which the house is situated belonged to Mohamed Ali Adeeye.

c. That in analyzing the testimonies tendered before the trial court, it is important to start by restating that to succeed in civil claims, a party has an obligation to prove their case on a balance of probabilities. The appellant as he plaintiff in the lower court case was the one who had moved to the trial court for an order that she be declared as the rightful owner of the house among others. She had alleged inter alia that the defendant had without any colour of right taken over the house in an effort to disinherit her. The appellant therefore had to discharge the duty placed upon her by sections 107 to 109 of the Evidence Act chapter 80 of Laws of Kenya which states;

- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person.”

The learned trial magistrate was aware of who, between the two parties herein, had the burden to tender proof as seen at paragraphs 10 to 13 of the judgement delivered on the August 19, 2021, where sections 107 and 108 of the Evidence Act were cited, together



with the decision of the Court of Appeal in the case of *Ignatius Makau Mutisya versus Reuben Musyoki Muli eKLR*, where the court held that;

' On the issue of burden of proof, we need to examine whether the appellant discharged his burden of proof on a balance of probability. We can borrow from the wise words of Denning J, in *Miller vs Minister of Pensions* [1947]2 All ER 372 discussing the burden of proof where he said;

'That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.'

The legal burden of proof in this suit lay squarely on the appellant, and it mattered not whether the respondent personally testified or called another person as witness to give evidence in his defence.

- d. The court has carefully considered the evidence tendered before the trial court as summarized above, and perused the decisions made in the related matters by the High Court and the Kadhi's Court between the parties herein relating to the house in dispute, and found no basis upon which the decision of the learned trial magistrate that the appellant had failed to prove her case to the standard demanded of her by the law can be faulted. The learned trial magistrate's judgement at paragraphs 14 to 16 confirms that the testimony presented by the appellant was given due consideration before the trial court came to the finding that 'In the end, I find and hold that although plaintiff presented several documents in support of her claim she failed to prove her case to the required standard, as such the plaintiff's suit is dismissed.' There is no evidence to show that the learned trial magistrate's decision was based or influenced by any extraneous facts as alleged.
- e. That the fact that the respondent did not personally testify in court in his defence did not add any benefit or credit to the appellant's case. It is the appellant who had initiated the suit that was heard by the lower court against the respondent, Ismael Fundi Reje. The record of appeal at page 039 contains the 'defendant's list of witness'. The name of Mwanaisha Seif is at number 2, and her statement is at page 040. The said witness testified as DW1, a witness for the respondent. She did not state in the statement or her oral evidence in court that she anything else other than a granddaughter to the respondent and a witness for the defence. She did not indicate at all that she was representing or had substituted the respondent. She therefore did not need to have obtained a power of attorney to be a witness in a matter where her statement had been filed and served in accordance with order 11 of the *Civil Procedure Rules*. It is therefore misleading and without the support of the law for the appellant to claim that the respondent's failure to personally testify rendered his filed statement of defence 'just a shell and any other allegations therein remain just such' as evidence was tendered by DW1, a witness, unlike in the case of *Grace Nzula Mutunga versus Joyce Wanza Musila [2017] eKLR*, that cited the decision in *Janet Kaphire Ouma & Another versus Marie Stopes International (Kenya) Kisumu HCC No 68 of 2007*, where the defendant did not present any evidence other than filing a defence.



- f. That in view of the finding in (e) above, it follows that the learned trial magistrate conclusions at paragraphs 7 and 8 of the judgement to the effect that leave of the court was not obtained to allow DW1 testify in place of the respondent, and that she was a stranger in the proceedings for absence of a power of attorney executed by the respondent amounts to a misapprehension of the law. DW1 was indeed a competent witness for the defence, and as the respondent had satisfied the requirements of order 11 of Civil Procedure Rules by including her name in the list of witnesses and filed her statement. That error did not however affect the final finding of the trial court.
- g. That the proceedings before the lower court that are part of the record of appeal at page 0164 to 0165 contains the observations during the visit to the locus on the February 17, 2021. The court made the following observations;

' Court;

Scene visited. House in dispute inspected.

Descriptions of house;

From main entrance there are three rooms on each side of the main door.

On the left side there are two smaller rooms towards the end and on the right there is a toilet facility.'

The learned counsel for the appellant did not submit on that finding on the visit to the house in dispute. The learned counsel for the respondent submitted that the house as built did not correspond to the building plan relied upon by the appellant, and that the learned trial magistrate was right in his finding that the appellant had not proved her case to the required standard. That though the learned trial magistrate did not make any specific pronouncement on the site visit's observations in the judgement, the fact that he made reference to the building plan at paragraph 6 can only mean the site visit's observations thereof were given due considerations before coming to the determinations arrived at.

- h. That on the issue of the place of the Islamic Law of inheritance that the parties allege the learned trial magistrate had failed to appreciate the main issue before the trial court was of title to the house and not a succession matter. The suit had arisen after the High Court decision in Mombasa High Court Family Division Civil Appeal No 5 of 2014 which restated the place of the Islamic Inheritance Law on the matter.
- i. That though the respondent has partially succeeded in the cross appeal, while the appellant has wholly failed in her appeal, the court is of the considered view that each party bears their own costs in both the appeal, cross appeal and the lower court the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.
  - 1. That flowing from the foregoing the court finds and orders as follows;
    - a. That the appellant's appeal has no merit and is disallowed in its entirety.
    - b. That the cross appeal is allowed limited to the court's pronouncement in (f) above.
    - c. That subject to (b) above the lower court decision is upheld.
    - d. Each party to bear her/his own costs in both the appeal, cross appeal and the lower court.



Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 7th DAY OF DECEMBER 2022.**

**SM Kibunja, J**

**ELC MOMBASA.**

**IN THE PRESENCE OF;**

APPELLANT: Absent

RESPONDENT: Absent

COUNSEL : Mr Mumim for Khatib

Mr Ambwere for Respondent

**WILSON .. COURT ASSISTANT.**

**SM Kibunja J**

**ELC MOMBASA.**

