



**Suleiman & 4 others v Issa (Environment & Land Case 398 of 2017)
[2022] KEELC 15163 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 398 OF 2017
NA MATHEKA, J
DECEMBER 6, 2022**

BETWEEN

**SULEIMAN ISSA SULEIMAN 1ST PLAINTIFF
FAIZA ISSA SULEIMAN 2ND PLAINTIFF
FATMA ISSA SULEIMAN 3RD PLAINTIFF
NOOR ISSA SULEIMAN 4TH PLAINTIFF
SULTANA ISSA SULEIMAN 5TH PLAINTIFF**

AND

AHMED MOHAMED ISSA DEFENDANT

JUDGMENT

1. The plaintiffs aver that they are the beneficial owners of the house existing on plot number MSA/Block XVI 1/544 (hereinafter "the suit property") in which they have lived from birth to-date. The plaintiffs aver that the said house was initially a semi-permanent structure with makuti roof and build on a rented plot and that it belonged to the plaintiff's deceased mother Hamude Binti Khamis. The plaintiffs further aver that when the owners of the plot where the suit property is situated decided to sale the respective portions to the owners of respective houses without land the plaintiff's late father bought the land on which the plaintiff's mother's house existed and had it registered in the names of their older brother the late Mohamed Issa Suleiman the defendant's father and made an agreement with him that the defendant's father shall hold the title as trustee for himself his other brother and sisters (the plaintiffs). The plaintiffs further aver that their late father Issa Suleiman with the assistance of the 2nd plaintiff and others demolished the temporary structure and replaced it with a permanent structure on the ground floor and continued to use it as a family house where the defendant's deceased father and the plaintiffs continued to live. That plaintiff's deceased father did also give his consent to the defendant's deceased father to build his flat on the 1st floor where the defendant's father moved in



with his wife and family and has continued to be used as their family home to-date. That despite being given an express permission to build on the first floor the defendant's deceased's father proceeded to build 2 more floors (i.e. 2nd and 3rd floor). That the defendant was born on the suit property and from the time he was born to date the plaintiffs were living on the ground floor house. The plaintiffs aver that notwithstanding the registration of the title for suit property plot number MSA/Block XV11/544 in the name of the late Mohamed Issa Suleiman the actual ownership of the same excluding 1st, 2nd and 3rd floor belongs to the plaintiffs.

2. That further and without prejudice to the foregoing the plaintiffs aver that they have been in occupation of the suit property ever since they were born which over 12 years period and they have never paid any rent to any person whatsoever and that the entire world considered them as the true owners thereof and by reason thereof the plaintiffs have acquired ownership by way of adverse possession. The plaintiffs further aver that their occupation and claim of ownership over the entire suit property has been open and unchallenged. That despite the plaintiffs beneficial and statutory ownership of the house the defendant has filed Kadhis Succession Case No 72 of 2017 seeking to inherit the suit property on allegations that it belongs to his late father's estate. That the defendant is further seeking the plaintiffs eviction from the suit property in Kadhis Succession Case No 72 of 2017 on the ground that the plaintiffs' occupation in the suit property is unlawful. The plaintiffs aver that unless restrained by this honourable court the defendant will continue with the succession matter in Kadhis Succession Case No 72 of 2017 and illegally obtain orders for the plaintiffs eviction from the suit property before this honourable court gives its determination on their proprietary right over the suit property. The plaintiffs pray for Judgment against the defendant as follows;
 1. A declaration that the plaintiffs are the beneficial owners of the house existing on plot number MSA/Block XVII1/544 along with the defendant's deceased father's estate.
 2. In the alternative a declaration that the plaintiffs have acquired title by adverse possession
 3. A permanent injunction restraining the defendant personally or through his servants and/or agents from evicting the plaintiffs from plot number MSA/Block XV11/544.
3. The defendant denies the allegation that the plaintiffs are the beneficial owners of Plot No MSA/Block XVII1/544. The defendant further states that his late father Mohamed Issa Suleiman (Deceased) purchased the suit property from one Abdula Kade-Rdina and Sakinabai Abdulkarim in 1966 for a consideration of kshs.1,000.00 after which an indenture was duly executed and registered on October 1, 1966 in his name. The defendant further states that the mud walled house that had been erected on the suit property was a house without land which belonged to the plaintiffs' mother. The deceased purchased the suit property together with buildings and improvements thereon including the mud walled house. The defendant denies that the plaintiffs' late father and the deceased made an agreement that the deceased will hold the title as a trustee for his brother and sisters. The defendant states that the temporary Structure was demolished in the year 1971. Thereafter, each family member parted and went their ways until after the construction of the permanent house/building. Further that the defendant states that the deceased invited his parents together with his siblings to stay with his family out of good faith and kindness. That during the deceased's lifetime, the plaintiffs had been living peacefully with the defendant and his family and no dispute concerning the suit property ever arose.
4. That after the deceased passed away the defendant and his siblings applied for the letters of administration of the deceased's estate. Prior to the confirmation of grant, a notice was advertised in the Kenya Gazette to enable any person with an interest in the estate of the deceased to file any objection. The plaintiffs never opposed the confirmation of grant nor did they challenge the names of the beneficiaries of the deceased. The defendant states that the plaintiffs have failed to prove ownership



of the suit property. The sale agreement relied upon by the plaintiffs is a forgery as the purported sale agreement indicates that the deceased bought the suit property from the plaintiffs' deceased father, which is misleading as the indenture indicates the vendors of the property were Abdula Kaderdina and Sakinabai Abdulkarim. The defendant states that he filed a suit in the Kadhi's Court, Succession Case No 27 of 2017 for the reason that the plaintiffs had refused to vacate the suit property and even claim to have a share in the same when in actual sense the deceased is the lawful owner of the property. The defendant states that the defendant and his family have never intended on evicting the plaintiffs from the suit property. If anything, the defendant's stay with the plaintiffs was peaceful up until the deceased passed on when the plaintiffs began alleging that the house belongs to their late father.

5. This court has considered the evidence and the submissions therein. It is the plaintiffs' case that they are the beneficial owners of Mombasa/Block XVII/544, belonging to their late mother Hamude Binti Khamis, which is currently registered in the name of Issa Suleiman, their late brother and father to the defendant. From the green-card dated October 13, 1966, the Mombasa/Block XVII/544 is registered in the name of Mohamed Isa Suleiman Zubeidi, who died on April 11, 1999.

6. It is trite that such title is held exclusively and the defendant proprietor enjoys possession, occupation and further privileges appurtenant to his title. In the case of *Ester Ndegi Njiru & another vs Leonard Gatei* (2014) eKLR the Court held that;

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

7. The plaintiffs claimed that Issa Suleiman held the title to the suit property in trust for himself and the plaintiffs, his siblings. They referred to an agreement dated June 4, 1979 between Mohamed Issa Suleiman (their late brother and father to the defendant) and Issa Suleiman Mohamed (their late father) in support of their claim that Issa Suleiman Mohamed allowed Mohamed Issa Suleiman to build on the suit property (PEX-1). PW1 the brother of the said Issa Suleiman testified that the house was a semi-permanent one owned by his mother Hamude. That the property was later registered in his brother's name to hold in trust for the rest of the family.

8. The defendant denied the plaintiffs claim and stated that his late father purchased the suit property from Sakinabai Abdulkarim and Abdulla Kaderdina on October 1, 1966 for Kshs 10,000 vide an indenture registered on October 13, 1966 (DEX-1). The defendant produced a green-card for Mombasa/Block XVII/ 544 which shows that his late father Mohamed Issa Suleiman Zubeidi was the registered proprietor of the suit property on October 13, 1966(DEX-7). The defendant contended that his late father invited his parents and siblings (the plaintiffs) to live with his nuclear family in the suit property and they lived peacefully until his demise. Upon the demise of Mohamed Suleiman Issa on April 11, 1999 (DEX-4), Saida Mohamed Issa and Firdaus Mohamed Isaa were issued with a confirmed grant to administer the estate of the Late Mohamed Suleiman Issa (deceased) on April 13, 2011 in High Court Succession No 371 of 2009(DEX-5).

9. In the case of *Isack Kieba M'Inanga vs Isaaya Theuri M'Lintari & another* SCoK No 10 of 2015 the Supreme Court Justices held that;

“.....each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members



of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.

10. A trust can never be implied by the court unless there was intention to create a trust in the first place. In *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* (2000) eKLR where the Court held that;

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

11. In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* (2017) eKLR the court also held that the onus lies on a party relying on the existence of a trust to prove it through evidence because;

“The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

12. It follows that evidence must be led that points to the root of the land. Pertinent question that must concern this court are such as how was the land first registered? The burden of proving that the late Issa Suleiman Mohamed held title in Mombasa/Block/XVII/544 in trust of the plaintiffs lays with the plaintiffs. They have to prove that there was an agreement or a promise and that the defendant ought to have acted upon that promise or agreement. I have perused the agreement dated June 4, 1979 between Mohamed Issa Suleiman and Issa Suleiman Mohamed; the defendant's father and grandfather respectively. In the said letter clause 1 states that the house was inherited by Hamude Binti Khamis (the defendant's grandmother) from her mother and assigned to the defendant's father on his behalf and that of his siblings (the plaintiffs). In Clause 2 it states that Issa Suleiman Mohamed bought the suit property sometime in 1967 and gave it to Mohamed Issa Suleiman to build an extension on the already existing house on the suit property and any other sibling who desired to build. I find that originally a mud walled house that had been erected on the suit property was a house without land which belonged to the plaintiffs' mother and the whole family resided there. The deceased father purchased the suit property in the name of the deceased's and the deceased made an agreement that he would hold the title as a trustee for his siblings. The plaintiffs were born there and live there without any interruption or paying rent to date.

13. The defendant has demonstrated that vide an indenture dated October 1, 1966 and registered on October 13, 1966, his late father Mohamed Issa Suleiman purchased the suit property from Sakinabai Abdulkarim and Abdulla Kaderdina Kshs 10,000 (DEX-1). The suit property was then registered on October 13, 1966 in the name of Mohamed Issa Suleiman Zubeidi (DEX-7) who on August 7, 1971 entered into a contract with one Juma Haji Sumra to construct a single story building on the suit



property for Kshs 45,000/=(DEX-2). The said building was later approved by the then Municipal Council of Mombasa on March 1, 1972 and declared fit for occupation (DEX-3). I find he did so as a trustee.

14. The defendant's father, the Mohamed Suleiman Issa died on April 11, 1999 (DEX-4) and Saida Mohamed Issa and Firdaus Mohamed Issa, applied for and were granted with a certificate of confirmation of a grant on April 13, 2011 in High Court Succession No 371 of 2009(DEX-5). These proceedings have been stayed pending the outcome of this case. Upon perusal of the confirmed grant, I do note that the Hamude is a beneficiary to the estate, her name is number (10) on the schedule of the beneficiaries to Mombasa/Block XVII/544. The plaintiffs are children of the said Hamude. It is only after the defendant's father, the Mohamed Suleiman Issa died that the defendant now wants to evict his uncle and aunties who are the plaintiffs. Indeed the defendant has testified that he has named the plaintiffs as beneficiaries in his father's estate concerning money but they are not beneficiaries when it comes to the suit property. Where does he expect his extended family to relocate to at their advanced age? I find that the plaintiffs are the beneficial owners of the house existing on plot number MSA/Block XVI 1/544 in which they have lived from birth to-date. I find the plaintiffs have established their case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiffs are the beneficial owners of the house existing on plot number MSA/Block XVII/544 along with the defendant's deceased father's estate.
2. A permanent injunction restraining the defendant personally or through his servants and/or agents from evicting the plaintiffs from plot number MSA/Block XVI 1/544.
3. Costs to the plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF DECEMBER 2022.

N.A. MATHEKA

JUDGE

