



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 149 OF 2017**

**FUAD RUBEYA SALIM .....1<sup>ST</sup> PLAINTIFF**

**AISHA RUBEYA .....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**FREDRICK OSIEM MATEGWA..... 1<sup>ST</sup> DEFENDANT**

**MAHENDRA GOVINDJI .....2<sup>ND</sup> DEFENDANT**

**JOASH ORINA .....3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR MOMBASA .....4<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERA.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

(Plaintiffs filing suit on behalf of the estate of a deceased person claiming that the 2<sup>nd</sup> defendant illegally sold land to the 1<sup>st</sup> defendant, which land ought to have been sold to the deceased; deceased having been tenant of the 2<sup>nd</sup> defendant on a house without land arrangement; there also having been other persons having the same arrangement with the 2<sup>nd</sup> defendant; the tenants filing suit seeking title by adverse possession; parties reaching compromise that the 2<sup>nd</sup> defendant would subdivide the land and sell the plots where the houses were located to the occupants; 2<sup>nd</sup> defendant doing so and giving notice of offer to purchase; deceased having passed on before the notice; plaintiffs not taking up the offer to purchase; 2<sup>nd</sup> defendant proceeding to sell to the 1<sup>st</sup> defendant; plaintiffs claiming that this was fraudulent inter alia because the 1<sup>st</sup> defendant is son of the 3<sup>rd</sup> defendant who acted as the chairman of the tenants ; held that offer to purchase ought to have been acted upon by the plaintiffs within the provided time; 2<sup>nd</sup> defendant cannot be faulted for selling the land after failure by the plaintiffs to take up the offer; no fraud exhibited in the sale to the 1<sup>st</sup> defendant; fact that he was son of the 1<sup>st</sup> defendant not by itself proof of any fraud; suit dismissed with costs)

**A. Introduction and pleadings**

1. This suit was commenced by way of a plaint filed on 26 April 2017. The plaintiffs have brought this suit in their capacity as administrators of the estate of the late Rubeya Salim Ahmed (hereinafter referred to as “the deceased”). They pleaded that the deceased was the owner of a house without land on a portion of land known as sub-plot No.12 Section XII Makupa, with the 2<sup>nd</sup> defendant as landlord. They pleaded that in the year 2010, the 2<sup>nd</sup> defendant agreed to sell to the persons owning the houses, the plots where the houses were located. It is pleaded that following that offer, the plaintiffs filed proceedings for the grant of letters of administration which were issued to them on 15 August 2016. They aver that after obtaining the grant, they approached the 3<sup>rd</sup> defendant who was the chairman of the group of owners of the houses without land, in pursuit of the deceased’s title, but were shocked to establish that the land where their house was located (now a separate plot registered as Plot 424/XIII/MN) had been transferred to the 1<sup>st</sup> defendant, the son of the 3<sup>rd</sup> defendant. The plaintiffs further plead that the defendants have jointly and severally colluded and acted fraudulently as against the plaintiffs. It is from the foregoing that the plaintiffs pray for judgment against the defendants jointly and severally for:-

- a. A declaration that the transfer of the plot No. Mombasa/Block XIII/495 to the 1<sup>st</sup> defendant was fraudulent and therefore void.
- b. An order directing the 4<sup>th</sup> defendant to revoke the 1<sup>st</sup> defendant’s title.

c. An order directing the 2<sup>nd</sup> defendant to transfer the title of plot No. Mombasa/XIII/495 to the estate of the late Rubeya Salim Ahmed.

d. As against all the defendants jointly and severally, cost of this suit and interest thereon.

2. The 2<sup>nd</sup> defendant opposed the suit by filing his defence. He averred that he was at all material times the owner of the Plot No. 12/XII/MSA (the mother land) which was later subdivided into 43 plots among them being the suit land herein, Mombasa/Block/XIII/495. He pleaded that the late Rubeya was a licensee on sub-plot No. 43; that the license was personal to the late Rubeya and the same was not transferable; and that it was subject to the deceased being up to date in paying ground rent. He pleaded that the late Rubeya was erratic in the rent remittance in the year 1960 & 1970, but thereafter, in 1984, he completely stopped paying ground rent or any part thereof. As a result of this fundamental breach, the license lapsed, and he became a tenant at will. He pleaded that in the year 1997, the late Rubeya and the 3<sup>rd</sup> defendant commenced the suit *Mombasa High Court Civil Suit No. 314 of 1997, Joash M Orina & 42 Others vs. Mahendra Govinji* seeking to be declared owners of the mother land through adverse possession. He opposed the suit but the tenants with houses on the plot approached him for an amicable settlement. They held a meeting on 7 October 2010, and the terms of settlement agreed upon. He was to subdivide the land into 43 plots and give those in possession of the sub-plots the first option of purchase, but the offer had to be taken within 90 days, with effect from 15 October 2010. The 2<sup>nd</sup> defendant further stated that the tenants who fulfilled the conditions within the agreed upon timelines were granted transfers and title deeds, while those who did not take up the offer after 14 January 2011, had their portion sold to other prospective purchasers. The 2<sup>nd</sup> defendant stated that the plaintiffs did not purchase the suit land and that it is why it was sold and transferred to the 1<sup>st</sup> defendant. He averred that by the time the grant of letters of administration was issued on 15 August 2016, the transfer of the suit land to the 1<sup>st</sup> defendant had already been registered on 23 September 2015, and valid title issued. The 2<sup>nd</sup> defendant averred that the plaintiffs are thereby estopped from laying claim over the suit land whose proprietorship changed hands lawfully, and the plaintiffs and the beneficiaries of the estate of the late Rubeya have only themselves to blame as they never took up the offer in time. The 2<sup>nd</sup> defendant stated that he was constitutionally within his right to dispose of his land in a manner he deemed fit.

3. The 1<sup>st</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence. Their pleadings were more or less in line with what the 2<sup>nd</sup> defendant pleaded. They averred that the late Rubeya together with the other 42 households were licensee in the mother land, and vide *Mombasa High Court Civil Case No. 314 of 1997*, they sought to be declared owners through adverse possession. On 7 October 2010, the tenants agreed that the offer to purchase the property would last for 90 days commencing 15 October 2010. They stated that due to laxity on the part of the plaintiffs, the 2<sup>nd</sup> defendant offered to sell the suit property to the 1<sup>st</sup> defendant for a consideration of Kshs. 2,500,000/=. According to the 1<sup>st</sup> and 3<sup>rd</sup> defendant, the transaction was undertaken in good faith and the 1<sup>st</sup> defendant is currently registered as the proprietor of the suit land. They averred that the suit land has never been the property of the late Rubeya and could not be part of his estate. They pleaded that by the time the grant of letters of administration was issued on 15 August 2016, the transfer of the suit land in favor of the 1<sup>st</sup> defendant had been registered on 23 September 2015, and a valid title issued. They denied that they owed the plaintiffs a duty of care over the suit land. They averred that the notion of duty of care is misconceived and inapplicable in this suit which pertains to voluntary acquisition of proprietary rights, and further to this, that they were not agents, servants, trustees or administrators of the plaintiffs.

4. The 4<sup>th</sup> and 5<sup>th</sup> defendants opposed the suit vide a joint defence. They pleaded that they are not privy to the contents of the plaint, and they further averred that the suit lacked merit as no cause of action had been raised against them, and hence the suit should be dismissed.

5. The plaintiffs filed a reply to defence. It is pleaded inter alia that the deceased was in fact owner of the subplot No. 43 having stayed there for over 12 years. They pleaded that the death of the deceased did not invalidate his ownership of the suit land and that the actions of the defendants amounted to intermeddling with the estate of the deceased.

## **B. Evidence of the Parties**

6. PW- 1 was Aisha Rubeya Salim, the second plaintiff. She adopted her witness statement wherein she inter alia stated that the late Rubeya owned a house without land and the 2<sup>nd</sup> defendant was his landlord. She stated that in the year 2010 the 2<sup>nd</sup> defendant agreed to sell portions of the land to the respective owners of the houses existing on the plots. Following the offer, she and her son filed proceedings for the grant of letters of administration, which were issued to them on 15 August 2016. After obtaining the grant, they approached the 3<sup>rd</sup> defendant, the former chairman of the owners without land, to pursue the title of the deceased, but were shocked to find that the suit property had been transferred to the 1<sup>st</sup> defendant who is his son. She contended that the defendants colluded and acted fraudulently.

7. Cross-examined by Mr. Okoko, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants, she acknowledged that the 2<sup>nd</sup> defendant was the owner of the land. She testified that the 2<sup>nd</sup> defendant sent them a letter asking them to purchase the suit land after her husband had died. They were given three months to buy the plots. She stated that they could not pay for the same because they did not have letters of administration. She thought that the 2<sup>nd</sup> defendant had no authority to sell the suit land to anyone if she did not pay within three months.

8. Cross-examined by Ms. Ombat, learned counsel for the 2<sup>nd</sup> defendant, she testified that the house was bought in 1961 and her husband was paying ground rent. She stated that the Chairman (3<sup>rd</sup> defendant) told them that they could not purchase the suit land without letters of administration. When they got the letters of administration, they learnt that the property had been sold.

9. Cross-examined by Mrs. Waswa, learned counsel for the 5<sup>th</sup> defendant, she testified that she has not given any money towards paying for the suit land, and she acknowledged that she has not bought the land.

10. Re-examined, she testified that when the 2<sup>nd</sup> defendant served her with the notice of intention to sell, the late Rubeya had already died. She reiterated that she could not purchase the suit land because they did not have letters of administration.

11. The 1<sup>st</sup> plaintiff, Fuad Rubeya Salim testified as PW-2. His evidence was more or less a replica of that of PW-1, and with that evidence, the plaintiffs closed their case.

12. DW-1 was the 3<sup>rd</sup> defendant. He testified that he was the chairman of Mwangeka Squatters from the year 1987 to 2010. He testified that they sued the 2<sup>nd</sup> defendant and he agreed to subdivide the land into 43 plots. The 43 subplots were registered in his name and in the year 2010, he gave them 3 months to pay and have the plots transferred to them. He testified that most people took up the offer and thereafter he ceased to be the chairman leaving it to individual communication.

13. Cross-examined by Mr. Hamza, learned counsel for the plaintiff, he testified that after the subdivision, he did not know where the plot of the deceased lay. He stated that the suit land is vacant with no house. He added that the Association of the group did not continue after the subdivision.

14. Cross-examined by Ms. Mwangi for the 2<sup>nd</sup> defendant, he testified that the letter of offer from the 2<sup>nd</sup> defendant was contained in a letter dated 18 October 2010. The transfer of the land to the 1<sup>st</sup> defendant was done on 25 August 2015.

15. The 2<sup>nd</sup> defendant closed his case without adducing evidence and I directed counsel to file written submissions.

### C. Submissions of Counsel

16. Mr. Hamza, learned counsel for the plaintiffs, inter alia submitted that the owner of the suit property being deceased, the provisions of Section 45 of the Law of Succession Act on intermeddling would be relevant in these proceedings.

17. For the 2<sup>nd</sup> defendant, it was submitted inter alia that the relationship between the deceased and the 2<sup>nd</sup> defendant was that of landlord/tenant and the deceased had no right over property that could form the basis of a succession. He pointed out that he was not the owner of the suit property but a mere tenant in a house without land concept. He referred me to various authorities that explain this “house without land” concept. He submitted that this does not equate to ownership of the land. He submitted that Rubeya died in 2005 and thus the offer of sale could not be construed to apply to him, as an offer cannot be made to a deceased person. He submitted that there was no explanation why the letters of administration were taken out in 2016, eleven years after his death. He submitted that the plaintiffs did not accept the offer to purchase and there was no other option but to have the property offered to other persons.

18. For the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, counsel submitted that the plaintiffs did not activate the offer to buy the plot but waited for an indefinite period. Counsel submitted that a licensee or tenant at will does not have time running in their favour. He submitted that the tenancy did not form part of the overriding interest.

19. I have considered the above submissions alongside the authorities provided especially those explaining the house without land concept. I appreciate the submissions and industry of counsel. I take the following view of the matter.

### D. Analysis and determination

20. The germane facts are really not in contention. The deceased and several other persons appear to have been permitted to have occupation of portions of the mother land on a “house without land” arrangement. This is a concept where a person is given permission to build a house on land, but the ownership of the land remains separated from the ownership of the house. As explained by the Court of Appeal in the case of *Abdukrazak Khalifa Salimu vs Harun Rashid Khator & 2 Others (2018) eKLR*, this is more or less a tenancy arrangement. In that case, it was stated as follows :-

“...we are persuaded by dictum in **Famau Mwenye & 19 Others vs. Mariam Binti Said, Malindi High Court Civil Case No. 34 of 2005**, where the trial judge likened the concept of house without land to a lease stating, “*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*”. A lease can be determined by either effluxion of time or notice given by either party in accordance with the lease agreement or as stipulated by law in reference to the period in which rent is paid.”

21. The above dictum, as will be seen shortly, will be critical to my determination in this case. But let me continue with the facts of the case. As I had stated, there was a house without land arrangement. What followed was an agitation by the holders of the houses to have ownership of the land where the houses were located. To pursue this end, they filed suit seeking title by way of adverse possession. That case is *Mombasa High Court Civil Suit No. 314 of 1997, Joash M. Orina & 42 Others vs Mahendra Govindji*. It is not very clear what happened in that case, and whether or not it was heard to conclusion, for no party produced the proceedings of that case. However, there is consensus amongst all parties, that subsequent to the filing of that case, the 2<sup>nd</sup> defendant herein, as the land owner and as the defendant in that case, agreed to subdivide the mother plot into 43 portions, and sell to each holder of a house without land, the plot where the house was located. The intention was to have an end result where these persons would get absolute title to the land where the houses are located. This would inevitably bring to an end the house without land arrangement as the interest of the 2<sup>nd</sup> defendant would be terminated.

22. There is again consensus, that the persons therein were given 90 days notice to accept the offer to purchase. Many did, and titles to the subdivided plots were issued to them. The plaintiffs in their evidence did acknowledge that this notice was issued and that they were aware of it. They however did not pay for the plot. Their excuse is that they could not do so because they did not have letters of administration. That to me, is not a valid excuse. There was the further allegation that the 3<sup>rd</sup> defendant is the one who advised them that they could not purchase without letters of administration. There is no proof of this and this must be disregarded. Even if this was said by the 3<sup>rd</sup> defendant, and I have already held that there is no evidence of this, this did not take away any obligation upon the plaintiffs to seek independent advice.

23. The offer to purchase could not be made to a person who is deceased, and whichever way you look at it, that offer was made to the persons who were in possession of the house, or land where the house was located, and that is the plaintiffs. It was thus incumbent upon the plaintiffs to accept that offer. When a tenant who does not have a registered and protected interest dies, then the person in occupation, continues as a tenant at will and that tenancy is terminable at the instance of the land owner. Indeed, in the case of *Abdukrazak Khalifa Salimu vs Harun Rashid Khator & 2 Others (2018) eKLR* (supra) it was acknowledged the holder of a house without land is a tenant, and that tenancy can be terminated by notice. In my opinion, the 90 days offer to purchase, acted both as a notice to purchase, and a notice to terminate the tenancy. I do not see how it can be argued that an overriding interest continued in favour of the plaintiffs and I also do not see how it can be urged that the land remained the property of the estate of the deceased. It was all along the property of the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant was offering to sell it to the plaintiffs as occupants. When they did not accept the offer, they remained at the mercy of the owner of the land, for that owner had already given notice that he was intending to sell the land, and would no longer be their landlord. I wonder what the plaintiffs expected the 2<sup>nd</sup> defendant to do. Did they expect that he would, for an infinite period, wait for them to accept their offer? If that was their expectation, then it is misplaced and not backed up by any law or equity.

24. Given that the plaintiffs failed to take up the offer, I see nothing wrong with the 2<sup>nd</sup> defendant transferring the suit land to the 1<sup>st</sup> defendant. The relationship between the 1<sup>st</sup> and 3<sup>rd</sup> defendant is completely immaterial. The fact that the 1<sup>st</sup> defendant was son of the 3<sup>rd</sup> defendant did not make him ineligible to purchase the 2<sup>nd</sup> defendant's interest. Anybody was at liberty to buy the land, when the plaintiffs failed to take up the offer to purchase. There was no breach of any trust and no fraud whatsoever. In fact, from what I can see, title was transferred in the year 2015, five years after the offer was made to the plaintiffs. It appears that the 2<sup>nd</sup> defendant waited for quite a considerable time before giving up on the plaintiffs and moving on to sell the land to the 1<sup>st</sup> defendant. There is absolutely no evidence tendered that this sale was not above board. The plaintiffs have not produced any evidence of any offer, or even a request to the 2<sup>nd</sup> defendant to give them additional time. How was the 2<sup>nd</sup> defendant to know that they had any interest to purchase without them formally communication to him? The only conclusion any reasonable person would have arrived at is that the plaintiffs, who were in possession of the land, had no interest, or no means, to make the purchase. You cannot place any blame on the 2<sup>nd</sup> defendant for selling the land to the 1<sup>st</sup> defendant who must have been ready and willing to purchase, and neither can you blame the 1<sup>st</sup> defendant for purchasing the land, after the occupants had failed to do so.

25. It will be seen from my above discourse that I see no merit in the plaintiffs' case. It is hereby dismissed with costs.

26. Judgment accordingly.

**DATED AND DELIVERED THIS 6TH DAY OF OCTOBER, 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**