



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC APPEAL NO. 20 OF 2019**

**KOMBO JUMA MZEE.....APPLICANT**

**VERSUS**

**SOFI AWINO.....RESPONDENT**

**JUDGMENT**

***(Appeal against decision of Hon. Nang'ea CM in Mombasa CMCC No. 678 of 2014; appellant suing the respondent claiming that he is the owner of a house without land; no evidence tendered of such ownership; suit dismissed; appellant claiming that he ought to have succeeded in the suit; no error in dismissing the suit as no evidence of ownership of the house was tendered; on the contrary, it is the respondent who produced evidence that she or her late husband owned the house; appeal dismissed with costs)***

1. This is an appeal arising from the judgment of the Honourable J.M Nang'ea, Chief Magistrate vide which he dismissed the appellant's suit with costs to the respondent.
2. The background is that the appellant commenced suit by filing a plaint on 8 April 2014. He contended that he is the proprietor of a house without land located on the Plot No. 216/Section VI Kwa Hola, Magongo, Mombasa County. He pleaded that the respondent was allowed to reside on the land as a licensee by virtue of being the widow of one Abubakar Rahul Ndira (deceased). It was pleaded that by a notice dated 11 October 2013, the appellant terminated the licence given to the respondent and asked for vacant possession. The respondent did not vacate the property and thus the appellant filed the suit seeking vacant possession.
3. The respondent filed a defence where she refuted the claim that the appellant is the proprietor of a house without land on the disputed plot. She pleaded that she has been residing in the house since the year 2000 when she got married to the late Abubakar Rahul Ndira and no claim has been lodged by anybody concerning the said house. She pleaded that the late Abubakar died in the year 2008 and even then no person has lodged any claim against her. She averred that the late Abubakar left a written testament leaving his properties to her and one of the properties listed was the house without land on the suit property. She further pleaded that there are tenants and she is the one who has been collecting rent.
4. In his evidence, the appellant asserted that the house belongs to him and his brother, and that they pay ground rent to the owner, one Mohamed Mahadi. They claimed that their father allowed the respondent's husband to reside on the land while he worked for him. No receipts were however produced in evidence owing to a successful objection by counsel for the respondent. He called one witness who stated that the appellant has been paying ground rent and receipts issued. The respondent in her evidence did produce various documents including copies of the building plans, which were prepared by her husband and approved by the then Municipal Council of Mombasa; receipts evidencing payment of ground rent; and an application for electricity supply.
5. The learned trial Magistrate after evaluating the evidence was of the view that the appellant has failed to prove his case on a balance of probabilities. He noted that the appellant had not shown that he has capacity to sue on behalf of his late father who he purported to be the original owner of the suit property. He also observed that the appellant did not adduce any receipts to prove payment of ground rent. The case of the appellant was thus dismissed.
6. In this appeal, the appellant has listed four grounds of appeal as follows :-
  - (i) *That the learned trial Magistrate erred in law and fact by failing to consider the appellant as the lawful owner of the house without land located on Plot No. 216/4/Section VI/MN Kwa Hola Magongo.*
  - (ii) *The learned trial Magistrate erred in law by failing to consider the appellant's testimony and that of the appellant's witnesses.*
  - (iii) *The learned trial Magistrate erred in law and fact by failing to consider the appellant's written submissions.*

*(iv) The learned Magistrate erred in law by taking into account irrelevant facts while making his decision.*

7. Counsel for the appellant, M/s Khatib & Company, in their submissions, submitted that the appellant has proved that he had locus to bring the suit because the house in dispute was transferred to him before the death of his father; that the respondent has now interest in the property as the only right to stay on the property expired upon the death of her husband; and that the respondent could not explain how her deceased husband acquired the property. He submitted that the learned Magistrate failed to properly consider the submissions of counsel and asked that the judgment be set aside. In the alternative, he asked that the court do allow the appellant to produce the documents which he was barred from producing in the trial court.

8. On his part, Mr. Kenzi for the respondent pointed out that the appellant did not produce any document to support his case. He submitted that the appellant filed no list of documents despite being given a chance to do so. He referred to the evidence of the appellant where he stated that the house belonged to his father, one Juma Mzee, and submitted that if this is the case the appellant needed to have a grant of letters of administration. He submitted that having not produced any document, the appellant had failed to prove his case.

9. I have considered the appeal. The appellant was the plaintiff and it was incumbent upon him to prove his case. His suit was based on the claim that the house in issue does not belong to the respondent or her late husband but belongs to him. He did state that previously it was owned by his late father Juma Mzee. I agree with the argument of the respondent, that if it is the position of the appellant that the house belongs to the estate of his late father, then he needs to hold a grant of letters of administration to give him capacity to sue. That aside, if it is his case that the house belongs to him, then he needed to demonstrate that he himself has a licence over the house from the owner of the land. He had no document to prove this. Of course, it has emerged that he tried to produce some documents at the hearing which were objected to successfully. On my part, I cannot fault the trial Magistrate for declining to admit the documents for they were never discovered during pre-trials. If the appellant was aggrieved by this, he needed to either apply for review, or appeal that decision to deny him introducing the documents at that stage of the case. I am aware that in his submissions, Mr. Khatib mentioned that the appellant ought to be given a chance to produce these documents within this suit. That point was only raised during submissions and cannot be entertained. If the appellant wished to introduce additional evidence at the appeal stage, he needed to file a formal application for consideration following the provisions of Order 42 Rule 27. In any event, there is not in the memorandum of appeal any ground that the trial Magistrate erred in declining to admit the documents that had not been discovered and I think this proposal for admission of the evidence at the submissions stage was nothing but an afterthought.

10. I do not see how it can be argued that the trial Magistrate erred. There was a wealth of evidence that it is the respondent's husband who built the house. There was evidence that he and his family, including the respondent have been living on this house for a significant period. There was never produced any documentary evidence that the appellant or his father ever owned this house or ever received any rent for it from the respondent or her late husband. In essence, there was certainly no evidence to support the claims of the appellant. Clearly, the appellant failed to prove his case to the required standard and the trial Magistrate was correct in dismissing the suit. I am unable to set aside his judgment.

11. For the above reasons, this appeal is dismissed with costs.

12. Judgment accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 5<sup>th</sup> day of March, 2020.**

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**MUNYAO SILA,**

**JUDGE.**

**IN THE PRESENCE OF:**

Ms. Arika holding brief for Mr Khatib for the appellant.

Mr Kenzi for the respondent.

Court Assistant; David Koitamet.