



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 188 OF 2006

ABDULRAZAK KHALIFA SALIMPLAINTIFF

AND

HARUN RASHID KHATOR (*as administrator of the*

Estate of the Rashid Khator Salim, Deceased)

IBRAHIM RASHID

MUSTAFA RASHID.....DEFENDANTS

JUDGMENT

Introduction

1. By a Plaintiff dated 21st August 2006, the Plaintiff who claimed to be the owner of a *House without Land* on the suit property Plot NO. 3891 (Original 284/197) Section III MN, sued the Defendants, whose interest in the land was not disclosed, for nuisance alleging that the Defendants had deposited building materials on the road leading to the entrance to his house, cut down trees, dug a foundation and were putting up a building so close to the front entrance of his house as to interfere with his rights to easement, unhindered access to his house, free flow of air and natural light and ventilation on the front of the house and sought against the Defendants a permanent injunction to restrain the construction and cutting down of his trees and costs.

2. The Plaintiff alleged that while the suit was pending the Defendants, on the advice of their counsel, went on with the construction to its completion prompting the Plaintiff to amend the plaintiff, which he did with the leave of the court granted on the 19th February 2009. In the amended Plaintiff dated the 25th February 2009 and filed on 2nd March 2009, the Plaintiff complained at paragraphs 6 (b) and 6 (c) that the building put up by the Defendants was “preventing his free access to his house through the main door, and is also obstructing natural light and fresh air from entering his house” and that it was “a nuisance to the plaintiff’s said house and has rendered it dark, unwholesome and of much less value to the plaintiff.”

3. On the basis of the amended plaintiff, the Plaintiff prayed for additional relief for declaration of nuisance and violation of plaintiff’s easement together with an order for the pulling down of the building to restore the suit property to its original state and damages.

4. By their Amended Defence and Counter Claim filed on the 23rd March 2009, amending Defence and

Counter-Claim dated 2nd September 2006, the Defendants denied the construction of the building and its effect on the plaintiff's alleged rights, and put the Plaintiff to strict proof thereof.

5. The Defendants' substantive defence as set out in the Defence and Counter-Claim is that the suit property belonged to their father Rashid Khator Salim, deceased and that the Plaintiff was a trespasser thereon with no colour of right to sue or the reliefs sought in the plaint. Accordingly, the Defendants counter-claimed for an order of eviction of the Plaintiff from the suit land. The Defendants however denied that their construction had barred the plaintiff's access to his house or become a health hazard to the plaintiff.

6. In a reply to the Defence and Defence to Counter-Claim dated 21st September 2006, the Plaintiff denied the facts and the law which formed the basis of the Counter-Claim and the averred that "the portion occupied by him has at all times been under the care of the Mosque known as Masjid Rahma to whom the plaintiff's predecessor in interest was paying rent and which Mosque's trustees and or administrators consented to the sale of the house now occupied by the Plaintiff from the previous owner thereof Said Bawazir and began accepting rental from the Plaintiff until stopped by the Defendants albeit unlawfully and or without justification" and that there were other persons on the Mosque land who occupied the land on the same basis.

The Issues for determination

7. The Plaintiff filed his set of issues dated 26th April 2010 but the defendant did not. However, from the pleadings, the Court set the issue for determination into three broad questions, namely:

(a) Whether the Plaintiff is a trespasser on the suit property, or whether he has an interest known as **House without Land** on the property Plot No. 3891 (Original 284/197) Sec. III MN., and, consequently, whether the Defendants are entitled to an order for eviction of the plaintiff.

(b) If the Plaintiff has an interest in the land known as **House without Land**, whether the Defendants have constructed a building which causes nuisance to the plaintiff, and whether the Plaintiff is entitled to an order to pull down the building.

(c) Whether the Plaintiff is entitled to damages for nuisance.

The evidence

8. The Plaintiff testified as PW1 producing sale agreements on the purchase from one Mr. Said Ahmed Bawazir, in consideration of Ksh.300,000/-, of a *House without Land* which the latter had been constructed on the suit property with the authority of the Nur Mosque to which the said Mr. Bawazir and the Plaintiff upon the purchase paid ground rent of Ksh.100 to the Mosque (for which he produced receipts for the period between October 2002 to June 2003), until sometime later when the Defendants asked the Mosque not accept rent from him. The Plaintiff claimed without any documentary proof that the suit property was Mosque land but that the defendant's father, whom claimed was his uncle, had been to take a portion of it after assisting the Mosque with survey costs. He said:

"I have sued the Defendants because they have constructed a house which obstructs my access to my house. The Defendants' house is on plot 284/III/MN Original Plot. The Defendants' house now stands on sub-plot 3891. My house also stands on the same plot. The owner of the original plot is Mohamed Omar. The entire plot was 1590 acres. The family of Omar including my father and I were living on the plot. The family members sued when they realized that the whole plot had gone to one person. It was decided that Mohamed Omar keeps 600 acres and the rest was subdivided amongst other members of the family. My house is on the portion which was distributed amongst the relatives. The portion where my house stands belongs to the Mosque- Nur Mosque - which set aside for the Mosque. The Mosque allowed us to build without land for payment of rent to the Mosque. The Mosque allowed Mr. Bawazir Said Ahmed to build the house. I bought the house from the said Mr. Said Ahmed Bawazir. I have an agreement of sale prepared

by SMK, Advocate [which] I produce as PEX1.....

The father to my father and the defendant's father are brothers. We are cousins. The Defendants' father, Mr. Rashid, was allowed by the Mosque officials to meet the survey costs for the Mosque on the understanding that he would keep the portion of land in excess of 1 acre that the Mosque needs as a wakf. The house was built by Mr. Bawazir on the Mosque land along with other houses by other persons similarly permitted by the Mosque. I am not a trespasser. ”

9. The Plaintiff further testified that the Defendants had taken advantage of the lapse on interim orders he had obtained in the suit - when his counsel neglected have then extended - to quickly complete the construction of the building on the plot. On the effect of the said building to his house, the Plaintiff said:

“The building obstructed my access to my house. Both houses are situated along Kanamai Beach road. My house is about 7 metres from the road. My house faces the South in the direction of murrum road to the beach. The sitting room and the master bedroom also face the road. The Defendants' house is only 2 metres at the front between the road and my house. It restricts my access to the road. The Defendants' toilet – a pit latrine- is built next to the window of my bedroom. The toilet is in frequent use because the building is a business place. I have to pass the building by going round the building before I access my house. The Defendants' house being a business place with shops, the corridor between the two houses is accessible to the public. The Defendants' building is the same height as my house. It blocks my access to light. I confirmed at the time of purchase of that the build I bought had been approved the Municipal Council. The Building Plan is produced as PEX4.”

10. PW2, Faud Abdalla Taib, the Plaintiff's witness, who claimed to be an architect working with M/s Dr. E. May & Partners, Architects but who could not produce evidence of his qualifications or employment with the said firm of architects or any qualification as a surveyor produced a **To Whom it May Concern** report purportedly on “survey undertaken on the 4th April 2008” on the suit property concluding with regard to the building alleged built by the Defendants on the suit plot that –

“In my opinion this structure has been put up with no regard to good neighbourhood or inconvenienced caused to the existing residential house. I find no genuine reason whatsoever why the structure is built right in front of mentioned house as its quite clear on site, there is plenty of open are around where could have been built without causing any grievances. I hope the information given will assist in establishing the legality of the built structure.” (sic)

That opinion is of little value in the absence of qualifications and other evidence establishing the witness as an expert.

11. The Plaintiff relied on a report, admitted into evidence under section 35 of the Evidence Act, allegedly prepared by a past Provincial Surveyor, one Chivatsi J. N., who could not be called as the Plaintiff he had lost contact with him following is transfer to Nairobi. The report purported to confirm that a building existed between the road and the plaintiff's and that the said building has encroached on the road reserve by about 35 sq. metres. The Plaintiff also produced photographs to show the plot before and after the alleged construction by the Defendants.

The Defendants' case

12. The 1st defendant, Harun Rashid Khator, (DW1) the Administrator of the Estate of his deceased father, Rashid Khator, for which he had a Confirmed Grant of Letters of Administration and which he produced in evidence together with a title to the land in the name of his deceased father and testified on the matter as follows:

“The Plaintiff is my cousin. Prior to his moving into the plot there was a house owned by the said Bawazir who had been authorized by my father to construct the house and pay ground rent to a Mosque which is across the road. Bawazir lived in the house for almost 10 years and in early

2003, we realized that there was another occupant of the house. Our father was still alive and we called Abdul Razak to appear before our father but he refused to come to the late Rashid. Our father asked us to refer the matter to the area Chief. Abdul Razak appeared but refused to cooperate after it was established that he was on a land which did not belong to him. Later on in August 2003 Rashid Khator died. We have tried to get Abdul Razak who is a relative to understand that he needs our consent to live in the house and he has refused.

We then decided to construct a house. There is a lot of land on the other side across the road. The Plaintiff has been violent and insulting. He has completely refused to negotiate a settlement. We cannot access the area. The last time we tried he beat up my brother and he was charged and convicted for assault. We have not been able to distribute the estate as no one wanted to be given where there was a dispute and we agreed to put up shops to generate income. We sought approval from the authority. Prior to the construction, there had been a court order barring but with legal advice, we proceeded because there was nothing barring the construction after the court order was not confirmed. Mr. Bawazir had asked my father [to be allowed] to put up a house to enable him supervise a construction which he was putting up nearby. The payment to the Mosque was for Ksh.100/- per month as ground rent to assist the Mosque. Before we started construction of the shops, I asked the District Officer (D.O) to call Abdul Razak to get him to agree with us but he refused to attend the District Officer. We went to the site and when we met him we told him that it was good to discuss [about] his interest in the land. He agreed to come for a family meeting which my brother attended. I did not attend the meeting. The Plaintiff is not a beneficiary to the deceased's estate. I refer to the confirmed Grant of Letters of Administration.

I have a counter-claim for the loss that I suffered because of the plaintiff's actions. We have not obstructed the plaintiff's house. The Plaintiff is our cousin and our intention is to solve the matter amicably. The Plaintiff has made a lot of construction behind his house. I have pictures of the site, DEX4.

There is a lot of space between the shop and the house. There is also space for the entrance to the plaintiff's house. The Plaintiff has constructed a jiko, a chicken house [coop] behind the house which all on our plot. The Plaintiff had been warned by the Chief against further construction. To the best of my knowledge, our father was not aware of any agreement between Bawazir and Abdul Razak. I therefore seek the prayers set out in the Counter-claim.”

The pictures of the property produced by the 1st defendant as DEX1 were produced with the consent of the parties.

13. On cross-examination, DW1 confirmed that Mr. Bawazir's house was put up before the Defendants' father was issued with a title to the suit land in 2001 and that the Plaintiff had lived in the house even during their deceased father's life but without seeking his permission. He said:

“The buildings are on my father's plot. The buildings are nearby. The shops are between the Kanamai road and Abdul Razak's house. The building has toilets outside. The toilet is used by the tenants of the shop. The toilet is about 5-6 metres from the plaintiff's house. I do not know the plaintiff's house arrangement. I do not know the position of the toilet in relation to the rooms of the house. It is not on road reserve. The house is about one metre from the road reserve. The shops are lower than the plaintiff's house. The Plaintiff passes through a corridor between the two houses. The Plaintiff bought the house from Bawazir, who built it on the land with permission of the owner. The title shows the plot was acquired by my father in 2001. The title was issued in 2001 but the land was owned by the deceased. I was in Primary School when the house was built. It was built on plot No. 284(87) subsection III MN. The approval according to the plan (PEX4) was done in 1987.

Before plot 284 was subdivided several people had shares in it. Bawazir was paying rent to the Mosque. There were other persons who had houses without land and they pay rent to the Mosque. We noted Abdul Razak paid rent to the Mosque. Our father told us that the Plaintiff had not sought

his permission to stay on the land. I told the Mosque not to receive rent on instructions of my father. The Plaintiff lived in the house during the life of our father. When the Plaintiff refused to come to our father we took him to the Chief. He did not cooperate but he was told at the Chief's Office that he could not live in a house that did not belong to him."

14. The 2nd defendant, Ibrahim Rashid Khator, DW2 testified so far as he knew about the matter as he was out of the country between 1999-2004, and said:

"I was out of the country from 1999-2004. I came back in 2004. My elder brother had been elected as the head of administration of the family. He took me round the land. He showed the pieces of land of our father. When we came to this land I found that there were houses and a Mosque. In one of the houses, there was a lady who abused us. She claimed we were interfering with her. The house is currently occupied by the Plaintiff Abdul Razak. When I left the country in 1999, he was not there. There was Bawazir. Nobody was aware of the change in occupation of the property. There is construction on the property. There are 3 shops in one building. Before construction of the shops, I personally asked the Plaintiff and informed him that I intended to construct shops. I told him to speak to his wife who abuse d us. He accepted. When I went to construct, the Plaintiff and his wife attacked me. I reported the matter at Kijipwe Police Station. The case was instituted at Kilifi. The court convicted him and sentenced him to community service. After that the Plaintiff filed the present proceedings at Mombasa. The shops are constructed on our land with a title deed. I saw the sale agreement in the court file. From the Sale Agreement (PEX1) the Plaintiff was buying a house. The shops do not block the plaintiff's house. "

SUBMISSIONS

15. The parties filed written submissions in support of their respective cases and judgment was reserved. The substance of the parties' submissions is as follows.

The Plaintiff's Submissions

16. The Plaintiff submitted that the Defendants' construction of the building right in front of his house was a deliberate and calculated move aimed at making it practically impossible to continue residing within the premises and thereby forcing the Plaintiff to move out. The Plaintiff sought to rely on the evidence of PW2, Fuad A. Taib, a private architect whose report of the premises and building dated 15th April 2008 (Plaintiff's Exhibit 5) opined that the building not only interfered with the Plaintiff's easement but was also illegally constructed as it contravened all building regulations, which he did not specify. Reliance was also placed on a similar report by J. N. Chivatsi, Coast Provincial Surveyor dated 17th August 2008 which indicated that the building had encroached on the road reserve by 35 sq. meters. The Surveyor was not called to testify and the map he used to deduce this was not placed on record. The Plaintiff however submitted that the Defendants had not challenged any of the reports, and had not produced any approved building plan nor attempted to show that their construction complied with the law.

17. The court was urged to recognize the plaintiff's claim for violation of an easement and environmental rights based on the concept of *House without Land*, which, it was submitted, is not strange in the Coast Province, as even the Courts have given judicial notice to it. The Plaintiff reasoned therefore that he was not in illegal occupation of the land on which the premises stood. The Defendants, it was submitted had not written to the Plaintiff to vacate, so this method of coercion should not be allowed to proceed.

18. The Plaintiff cautioned that an eviction would be unsafe as the Plaintiff is a relative to the deceased registered owner of the plot, and the court "...was never told that the Plaintiff has no succession right over his estate..." The import of this statement is not clear as there was no claim of dependency or inheritance of the deceased's estate was made by the plaintiff and such proceedings were not before the court. The Plaintiff urged that the counterclaim be dismissed with costs and the orders sought by the Plaintiff be granted.

The Defendant's Submissions

19. The Defendants submitted that the Plaintiff is illegally occupying the Defendant's plot. It was submitted too that the Plaintiff had failed to prove obstruction of access or nuisance by the building to the Plaintiff's house. The evidence, it was submitted, did not warrant the court to grant orders for demolition of the commercial building legally constructed on the Defendant's registered land. The court was urged to find that both DW1 and DW2 had been truthful in their assertion that they had tried to negotiate unsuccessfully with the Plaintiff to vacate the land, with the Plaintiff instead turning violent.

20. The court was informed in the hearing that the Defendants had even sought the assistance of the Chief to urge the Plaintiff to leave the premises but he had refused to do so. The issue of environmental nuisance, it was argued, was not proved by any expert witness.

21. The court was urged to find that PW2, the architect on whose report the Plaintiff had placed reliance had been discredited since in cross examination it was clear that he was not aware that there was a court case, or that the land in dispute belonged legally to the Defendants. PW2's qualifications had not been produced and as such his opinion could not be regarded as expert. Further, it was stated that he was neither an Environmental Expert nor a Physical Planner. The court was further asked to find that no reason had been tendered for the failure to call the maker of the second report – J. N. Chivatsi.

22. Finally, on the principles for the grant of an injunction as set out in *Giella vs. Casman Brown*, (1973) EA 358 the court was urged to find that the Plaintiff's continued residence in the premises was testimony to the inaccuracy of the allegation that the building had cut off his road access and free flow of air. The Plaintiff's failure to call an expert witness to adduce evidence that the building is an illegal structure built on a road reserve, a health hazard and environmental risk was also highlighted. The Defendant concluded by stating that they had the right to construct the building as the plot belonged to them. The Defendants explained that the building was intended for commercial purposes – a shopping complex, and therefore it had to be on the main road. The court was urged to dismiss the Plaintiff's suit and grant the orders sought in the Counterclaim.

THE LAW

23. Section 35 permits the admission of documents where their makers may not be called as witnesses without unreasonable delay in terms. However, admissibility is different from the weight to be given to the admitted document. As shown in section 36 of the Evidence Act, the weight to be given to evidence admitted under section 35 is diminished by certain factors:

“36. (1) In estimating the weight, if any, to be attached to a statement rendered admissible by section 35, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by section 35 shall not be treated as corroboration of evidence given by the maker of the statement.”

24. The probative value of the document admitted under section 35 of the Evidence Act must be considered in the light of all circumstances from which its accuracy or otherwise may be inferred. The fact that the maker of the document, who was hired or secured by the plaintiff, may provide incentive to misrepresent the facts. In addition cross-examination as to the veracity of his opinions or findings in the document is important in this matter where the report is based on visual observations and measurements allegedly taken at the site. Moreover, even if the court accepts the statement of the report that the building exits between the road and the plaintiff's house and that he said building has encroached on the

road reserve by about 35 sq. metres, it is a matter for the concern of the relevant highway or road authorities to take action in accordance with the law.

25. The concept of **House without Land** is unique to the Kenyan Coast and has been judicially recognized. In **Famau Mwenye & 19 Others vs Mariam Binti Said, Malindi High Court Civil Case No. 34 of 2005**, it was explained thus, “...the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim '**cujus est solum ejus et esqus ad coelum et ad infereos**'...” The learned judge in that case likened the system 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” and proceeded to treat it as such. If the same was to be adopted in this case, the rights of the Plaintiff would be limited to a tenant entitled to enjoy the use of the land on which his house is constructed. Such limited right would be recognized if passed legally to him from the landlord.

26. In **Christopher Baya and 2 Ors. V. Philip Kiluko and Anor.**, Mombasa HC Civil Appeal No. 64 of 2004, Khaminwa, J. understood the concept as follows:

“This arrangement is known as “House Without Land” meaning the right to build on another’s land under agreement which does not pass title to the land.”

27. I respectfully agree with Ouko, J. (as he then was) and Khaminwa J. that **House without Land** by its definition is more or less a lease. The Land Act, 2012 defines a “**lease**” as the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease. General provisions for leases are set out in section 55 – 77 of the Land Act, 2012. Under Section 57 (2) of the Land Act 2012, if the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but **without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.**

28. In the context of the general juridical scheme of Land ownership and registration, the **House without Land** concept is akin to a Lease without formal agreement in writing or registration. By operation of the law, both under the repealed Indian Transfer of Property Act (ITPA) 1882, which is applicable to the transaction subject of this suit, and the new Land Act 2012, the interest of the nature of **House without Land** becomes a periodic tenancy terminable by notice respectively equivalent to 15 days period or the period for which rent is payable.

29. The question of law and fact before the Court, however, is whether the plaintiff has rights as an owner of **House without Land**, and what effect such ownership, or lack of it, has on the plaintiff’s suit in nuisance.

DETERMINATION

Analysis of the evidence and findings of law and fact

30. From the analysis of the evidence presented before the court, it is possible to draw the following conclusions of fact on a balance of probabilities:

(a) The suit property is the property of the deceased Rashid Khator, the registered owner of the parcel of land No. 3891 (Original 283/197) and the father of the defendants to whose estate the 1st defendant is an Administrator;

(b) The plaintiff purchased the House without Land from the previous owner who had constructed it with the permission of the owner of the land. The plaintiff had continued to pay rent at Ksh.100 per month to the Mosque Nur in accordance with the arrangement then existing between the previous owner of the House without Land and the owner of the suit property; however, no consent or approval was obtained from the owner of the land for the transfer of the interest of House

without Land.

(c) The defendants, and their father during his life, had unsuccessfully sought to have the petitioner obtain their consent to his occupation of the house but no formal notice to vacate was ever given to the Plaintiff by the defendants or their father before them;

(d) The defendants had put a building with rental shops in front of the plaintiff's house on the Kanamai road frontage; the court is not able to conclude from the evidence, including the pictures presented by both parties, that the building offended the plaintiff's right to natural light, free-flow of air and access to his house as to amount to nuisance. An investigation and report by the National Environmental Management Authority (NEMA) could have assisted the court in such determination but this was not availed by the plaintiff who had the burden of proof.

(e) On the basis of the evidence presented, the court has found that the plaintiff retained access to his house albeit not via ample freeway.

(f) No evidence was adduced as to the adverse effects, if any, of the defendants' building on the plaintiff's house - in terms of extent and period of time of a day - to enable the court make a finding on the claim of violation of plaintiff's right to natural lighting and free flow of air, as pleaded.

(g) The proximity of the toilets at the defendants' building at 5-6 metres from the plaintiff's house may, however, call for relocation of the toilet, or reconstruction into a toilet type that does not permit the escape of foul toilet fumes, subject to NEMA's assessment.

(h) There was no conclusive evidence of encroachment of the defendants' building on to the road reserve and, this would be a matter of the Road authorities to enforce by ordering, as necessary if encroachment is established, reconstruction to keep the building within the plot limits, rather than a basis of nuisance on the plaintiff.

(i) The plaintiff had not paid any rent to the defendants; and

(j) The defendants had asked the Mosque not to accept rent from the plaintiff.

31. Is an owner of a House without Land entitled to protection against acts causing nuisance by the owner of the plot of land? I have no hesitation in holding that an owner of *House without Land* can just like his formal lease counterpart maintain an action for trespass or nuisance in relation to his *House without Land*, even from the owner of the land.

What then are the Plaintiff's rights on the plot, if any?

32. There is no issue of an easement on the land accruing in the circumstances of this case. As noted in the decision of the Court of Appeal in *Ruth Wamuchi Kamau v. Monica Mirae Kamau*, Civil Appeal NO. 45 OF 1983, (Kneller, Hancox, JJA and Nyarangi, Ag JA) an easement is –

“An easement is a convenience to be exercised by one land-owner over the land of a neighbour without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement.

Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come.”

33. The Plaintiff's claim is based on the allegation that he is rightfully upon the plot is a *bona fide* purchaser of a house without land. However, there is no evidence that the registered owner (deceased) did give his consent or was in any way involved in the transfer of the *House without Land* interest to the Plaintiff. In deference to the plaintiff's claim in the Plaintiff that his purchase of the house without land was

with the approval of the Mosque officials, the agreements of sale on the house (PEX1 (a) and (b)) do not show that an approval was sought or obtained from the Mosque officials! Even if there was approval from the Mosque officials, the same could not bind the registered owner of the suit property. The Plaintiff, as a purchaser of a **House without land** but without the consent of the owner of the land, did not have the rights of an owner of **House without Land** crystallize in him. He is in the same position as a sub-tenant who buys a lease from a head-tenant without the consent of the lessor: no rights under the lease can accrue by such transfer of lease.

34. Accordingly, I find that the plaintiff did not by his agreements for sale obtain a valid transfer of a **House without Land** rights which attach to the land. All he purchased was the house put up by Mr. Bawazir with the permission of the owner of the suit land but not its relation to the land. The sale is one the house structure as a *moveable* property as it does not attach to the land. The consent of the owner of the land which could have established a tenancy relation to the land was never obtained for the sale transaction. In other words, the plaintiff has no security of tenancy on the land and his house structure on the land registered in the name of the defendants' deceased father amounts to a trespass to land.

35. In light of the foregoing, the Plaintiff cannot maintain this action against the registered owner of the suit property or the Defendants who claim under him by transmission in accordance with the laws of succession. He has no *locus standi*. He could have had standing to sue had he become a *bona fide* owner of **House with Land** on the suit property with consent of the owner of the land. The Plaintiff is, as a trespasser, therefore, non-suited with respect of the suit in nuisance and damages therefor and the environmental issues raised therein. The plaintiff's suit must, accordingly, be dismissed with costs.

36. Although the Defendants had commenced action to negotiate terms of occupation of the Plaintiff from the suit land in the lifetime of the deceased through the instrumentality of the Chief, no tenancy notice to quit, orally or in writing, was ever given, probably on correct advice that the plaintiff was not a tenant. Even if the Chief's summons had the intention of removal of the plaintiff, the same could not be valid because the lawful way of removing a tenant who after termination of his tenancy who refuses to vacate a premise - or a trespasser, I might add - is by suit in court.

37. In **Gusii Mwalimu Investments Co. Ltd v. Gusii Mwalimu Hotel** (1995-98) 2 EA 100 where a landlord had taken possession of the demised premise through distress for rent, Shah JA. held:

“I have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession.”

I respectfully agree.

38. **An order for eviction?** It is trite that a trespasser or a squatter cannot resist the registered owner from evicting him. The Court of Appeal at Nairobi (Omolo, Tunoi & Pall, J.J.A.) in **Wreck Motor Enterprises v. The Commissioner of Lands & 3 Ors.** Civil Appeal No. 71 of 1997, (2005) ekLR, held that the title of the registered proprietor “takes precedence and is supreme over all other alleged equitable rights of title.” In **Cross Current Indigenous Network Ltd. v. Commissioner of Lands and Anor.**, supra, after considering *Wreck Motor Enterprises v. Commissioner of Lands & Another*, Civil Appeal No. 71 of 1997; *Dr. Joseph N.K. Arap Ng'ok v. Justice Moiyo Ole Keiwua & 4 Others*, Civil Application No. NAI 60 of 1997 and *Michael Githinji Kimotho v. Nicholas Muratha Mugo*, Civil Appeal No. 53 of 1995, the Court, (Ojwang'J., as he then was) said:

“The above trilogy of authoritative Court of Appeal decisions is crystal-clear as to the status of claims by a registered land-owner running against claims by the physical occupant of a suit land.

*Unless (i) the physical occupant meets the conditions of an adverse possession claim, and he has moved the Court through prescribed procedure for having his claim upheld, and his claim has been upheld; or (ii) the physical claimant proves to the satisfaction of the Court that the registered title-holder attained his proprietorship status by fraud or he was party to a misrepresentation which brought him thither, then the registered land-owner wins the argument hands down; and **the physical occupant must yield, quit, or be evicted. It seems to me that this is the current state of the law; and so it forms the doctrinal substratum whereupon any lesser equitable pleas may, in a proper case, be made before the Court.***

In the present case, the plaintiff as a purchaser of a **House without Land** without the consent of the owner of the land has no right in law capable of defeating the right of the registered proprietor of the land and he therefore **“must yield, quit, or be evicted.”** The Defendants' Counter-Claim for the eviction of the plaintiff, therefore, must succeed.

39. The Plaintiff has not paid rent since 2003, and as the Defendants, although clearly entitled, did not counter-claim for *mesne* profits in damages for trespass, the court will not award such damages. Considering the long period of time since about 2003 that the Plaintiff has been resident on the suit land and his investment on the property, as shown by the photographs, the court would be minded, in the interest of justice, enlarge the notice to a period commensurate to the exigencies of relocating a permanent house or seeking alternative settlement.

Orders

40. Accordingly, for the reasons set out above, the court makes the following orders in the Plaintiff's suit and the Defendants' Counter-Claim herein as follows:

- 1. The plaintiff's suit is dismissed with costs to the Defendants.**
- 2. The Defendants' Counter-Claim for the eviction of the Plaintiff from the suit property is granted to the extent and upon terms herein-below set out.**
- 3. The Plaintiff will have a period of three (3) months to remove the house and or to vacate the suit property.**
- 4. In the alternative, the parties are at liberty to enter in a *House without Land* Agreement under which the Plaintiff will pay to the Defendants such ground rent as may be negotiated between the parties from time to time; and the first such rent to be agreed by the 6th March 2015 when this suit will be mentioned before the court for purposes of recording any such agreement on the rent.**
- 5. In the alternative to the removal of the house, the Defendants may with the agreement of the Plaintiff pay to the Plaintiff such compensation for the value of the house as may be agreed between the parties.**
- 6. In default of the Plaintiff removing the house and or vacating the suit property within the three (3) months and in default of agreement as relates to the *House without Land* agreement or the compensation of the Plaintiff for the house, the Defendants will be at liberty to demolish the house at the Plaintiff's cost.**
- 7. Costs on the Counter-claim are awarded to the Defendants.**

41. The Matter will be mentioned on the 6th March 2015 in terms of Order No. (4) of paragraph 39, above.

DATED SIGNED AND DELIVERED THIS DAY OF 6TH FEBRUARY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Miss Namahya for Mr. Odongo for the PLAINTIFF

Mrs. Momanyi for the DEFENDANTS

Mr. Murimi - COURT ASSISTANT