



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CASE NO. 304 OF 2010**

**MUNA HUSSEIN ADARUS**

**SHIFAA HUSSEIN ADARUS.....PLAINTIFFS**

**= VERSUS =**

**KHALITHUM ABDULLA OMAR.....DEFENDANT**

**J U D G M E N T**

1. By a Plaint dated 2<sup>nd</sup> September 2010 and amended on 20<sup>th</sup> November 2014, the Plaintiffs instituted this suit against the Defendant. It is pleaded that the Plaintiffs are the registered owners of the leasehold interest in land parcel Title No. Mombasa/Block/XXXII/4 for a period of 99 years from 1<sup>st</sup> November 1984. The Plaintiffs hold the property together with three other parties; Asma Hussein, Aidarus Hussein Aidarus and the Late Shihabdin Hussein Adarus as tenants in common. That they inherited the residential flats from their late father on the suit parcel and subsequently sub-leased with the Plaintiffs sub-leasing flats Nos 3 and 4.

2. It is the Plaintiffs' case that the Defendant who purchased flat No. 2 from the Late Shihabdin Hussein Aidarus in 1999 breached the terms and conditions of his sub-lease by undertaking construction on the open space designated for use by all occupants of the flats together with their children and guests. That the construction was illegal based on a forged approval letter. Further, it was undertaken without the consent of the Plaintiffs as well as other occupiers of the flats yet it would interfere with their enjoyment and quiet possession including their right to air, uninterrupted view of the sea, the children's playground and access to the water tanks.

3. The Plaintiffs therefore seek the following reliefs:

**i. A permanent injunction restraining the Defendant from constructing or continuing construction on Plot No. Mombasa/Block XXXII/4 and interfering with the vacant possession of the Plaintiffs of the flats they occupy on the said land**

**ii. Demolition of any structures illegally erected therein**

**iii. General damages for illegal occupation and construction on the suit land**

**iv. Exemplary damages for proceeding with the illegal construction against the orders of the Court.**

**v. Costs of this suit and interest.**

4. Vide a defence dated 1<sup>st</sup> November 2010 and amended on 22<sup>nd</sup> December 2014, the Defendant denied the ownership and subletting details of the suit property as pleaded by the Plaintiff. He stated that the property is a leasehold interest registered in the names of Asma Hussein Adarus, Shihabdin Hussein Adarus, Munaa Hussein Adarus and Aidarus Hussein Aidarus. That he was to take the share belonging to Shihabdin Hussein Adarus but the Plaintiffs have refused to acknowledge his title. The Defendant admitted that he is the owner of flat No. 2 but denied that he had committed any breach of the terms and conditions of his sub-lease. He denied constructing on an open space and averred that the construction was above board having been permitted by a legitimate approval letter from the Municipal Council of Mombasa. That the criminal complaint by the Plaintiff on its alleged forgery was dismissed.

5. The Defendant pleaded further that the construction was done with the approval of Aidarus Hussein Adarus who is a brother and agent of the Plaintiffs who reside in the United Kingdom; as well as a co-administrator to the estate of the late Hussein who was the original owner of the property hence its co-owner. Moreover, contrary to the Plaintiffs claim the Defendant states that the construction does not interfere with the quiet possession of their units and that it would enhance the value of all the four flats in the property.

6. The hearing kicked off on 22<sup>nd</sup> September 2015 with two witnesses testifying on behalf of the Plaintiffs. Qassim Abu Mado gave evidence as PW1. He testified that he resides in London. That the Plaintiffs are known to him, Shifa being his wife and Muna his sister-in-law. PW1 continued that the Plaintiffs donated to him a Power of Attorney on 26<sup>th</sup> November 2013. That they were the owners of Plot NO. XXXII/4 with 4 flats. Flat No. 1 belonged to Aidharus Hussein, flat No. 2 to the late Shihabdin while flat Nos. 3 and 4 belonged to the Plaintiffs and Asma Hussein Adarus.

7. **PW1** narrated further that clause 8 of the Defendant's sub-lease marked as **P.ex 5** clearly spelt out the demarcated boundaries. He averred that he did not know how the Defendant took possession of flat No. 2 as completion did not take place. That the Plaintiffs have sued the Defendant because he went outside the boundary of each flat and commenced construction thereon without informing the Plaintiffs of her intention to do so.

8. **PW1** gave evidence that he complained to the Municipal Council of Mombasa who consequently issued notice to demolish but the Defendant disregarded the same and continued with the construction. She was then served with a court order in September 2010 which she again ignored. That the construction is completed. **PW1** stated that the approvals brought to court by the Defendant had prompted him to lodge a complaint before the filing of this case. He made a report to the Kenya Anti-Corruption Commission concerning the approval letter dated 21<sup>st</sup> April 2010 purportedly issued by the Municipal Council. That the KACC conducted investigations and found the letter to be a forgery. Subsequent to the approval letter, the Municipal Council of Mombasa issued a demolition order with respect to the Defendant's construction.

9. **PW1** testified further that the construction affected the entire plot's access to the sea as the Defendant had erected a door. It also blocked access to their water tanks. **PW1** contended that the Defendant breached the terms of her sub-lease which at paragraph 4(c) did not allow alterations without consent of the lessors. The sub-lease had been made between the 4 owners and Shihabdin Hussein Adarus who was also a lessee from the government. PW1 requested the Court to visit the suit premises, prayed for orders for demolition of the structures built, punitive damages for the Defendant's flouting of the law and costs of this suit. He produced the following as exhibits in support of the Plaintiffs' case:

i. *Power of Attorney registered as P.A No.8028 dated 31<sup>st</sup> August 2010 – P. Ex 1*

ii. *Certificate of Lease dated 26<sup>th</sup> June 2000 – P. Ex 2*

iii. *Certificate of Lease dated 29<sup>th</sup> November 2006 – P. Ex 3*

iv. *Sale Agreement dated 11<sup>th</sup> December 1999 between Shihabdin Hussein Adarus and the Defendant – P. Ex 4*

v. *Lease dated 23<sup>rd</sup> June 2000 – P. Ex 5*

vi. *Photographs – P. Ex 6*

vii. *Letter dated 16<sup>th</sup> August 2011 from the Kenya Anti-Corruption Commission attaching a Notification of Approval of the Application for Development Permission sated 21<sup>st</sup> April 2010 – P. Ex 7*

10. **PW1** continued that he took the photographs when construction was ongoing. He narrated that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> photographs were taken on 2011.7.11. The 2<sup>nd</sup> photograph was taken after the court order and shows that the construction is almost complete. On cross-examination, **PW1** stated that the Plaintiffs visited the suit property a year ago. That he took photos to show that despite the court order, the Defendant was still building. **PW1** doubted document No. 11 of the Defendant's list of documents as the price on it was different from that stipulated in the sale agreement. On document 3, he observed that only the share of the flat was transferred. That he had no authority to transfer the lease to the Defendant.

11. **PW1** averred that he did not know whether the letter dated 12<sup>th</sup> March 2010 reached the Plaintiff. Moreover, Aidarus had no authority to give consent as per the letter dated 24<sup>th</sup> May 2010. He stated that each of the beneficiaries owned the flats with Aidarus owning the flat on the ground floor. PW1 reiterated that there was no approval from the Municipal Council. That the Kenya Anti-Corruption Commission concluded that the Defendant's approval letter was a forgery. Further, he knew that the Defendant was acquitted but the decision was appealed. **PW1** could not tell whether the receipt from the council was fake. He was however adamant that NEMA does not give approvals for such construction.

12. With regard to the transfer of flat No. 2 **PW1** stated that he was aware that Aidarus consented to the same hence the Defendant's occupation was legally sound. He however reiterated that in accordance with P.ex 4; the agreement between Khulthum and Shihabdin, the interest sold was the lease of the flat only. He stated that he would not transfer the leasehold to the Defendant. PW1 narrated that he could not tell if the situation on the ground as depicted by photographs 3 and 4 was still the same as he no longer had access to the property. That he wrote a letter asking for the door to be opened. He continued that there was construction on the ground floor whereby the Defendant had put up pillars but he did not know of any agreement to that effect between the Defendant and Aidarus. He concluded that the Plaintiffs had not undertaken any renovations on flats Nos 3 and 4 requiring NEMA's approval and that he bore no ill will against the Defendant.

13. **PW1** was recalled on request by the Defence Counsel and cross-examined further. He gave evidence that he married Shifaa 20 years ago in Kenya. They then went to live in the United Kingdom. He continued that initially he was not a Kenyan and became a British citizen in 2000. That he was also known as Mwanyi Qassim Abu Mado but he had never lived in Malindi under that name. He asserted that his wife is still a Kenyan Citizen because in spite of her acquiring a British Passport in 2001, she did not denounce her Kenyan citizenship. PW1 narrated further that the Power of Attorney bears his wife's ID number. Muna on the other hand lives in Oman.

14. When put to task on matters concerning records pertaining to the suit property **PW1** stated that he showed the Court the title deed bearing the names of the registered owners. He admitted that according to County Government records, the rate payer is Hussein Shariff A. Sagaaf. **PW1** continued that according to the distribution agreement, each beneficiary was given their share of the suit property. Further, the 2<sup>nd</sup> and 1<sup>st</sup> Floor had a balcony. That the house was already fully built and the sublease registered at the Lands Office contained all conditions appurtenant thereto and the Plaintiffs had similar terms in their subleases. **PW1** was categorical that the sublease stated that no alterations could be made without the Landlord's consent. That the construction in question had gone beyond the boundaries of Flat No. 2.
15. Chrisantus Mwadime gave evidence as **PW2**. He stated that he works with the County Government of Mombasa in the Department of Lands, Planning and Housing. That in 2010, he was a Planning Assistant working with the former Municipal Council of Mombasa in aforementioned department. **PW2** adopted his statement and narrated that while he was studying at the Mombasa Polytechnic he received a call from Kenya Anti-Corruption Commission officers. An officer met him during his lunch break with PPA2 documents that granted the applicant permission to construct an approved development item. The officer asked **PW2** to scrutinize the document and to confirm if he had signed it. After doing so, **PW2** told the officer that the signature on the document was not his. With respect to the approval, the original of which should have been in the possession of the applicant, Kulthum Omar **PW2** stated that before being approached by the KACC officer, he had never seen the document.
16. **PW2** testified further that if one was to cross-check with the Council, the document could be obtained using the minute number. That the approval date does not change. He could not recall if he testified in Court with regard to the forgery but confirmed that he had been to the Directorate of Criminal Investigations headquarters where a specimen of his signature was taken. **PW2** produced the PPA2 proving the forgery as **P. ex. 8**. He stated that any development done using that approval letter was improper.
17. On cross-examination **PW2** confirmed that he was approached by the KACC officer sometime between August and December 2011. That he was only asked if he had signed the document. **PW2** admitted that he did not ask for time to verify the document against official council records. He continued that he had been authorized to sign PPA2s after the retirement of his boss in 2006. He however could not confirm if the stamp on the approval document was a genuine one from the council. The signature on the plan was not his but the one on the letter dated 11<sup>th</sup> November 2008 was his. **PW2** stated further that when recording his statement, he did not know that he was required to check with the council and that he had been out of office for about 6 months at the time.
18. **PW2** narrated that normally payment was made together with the application and plans attached. He asserted that he could not deny that the applicant made the application and paid fees and rates. In any case, the approval was not issued automatically. **PW2** gave evidence that Charles Omodo was the Chief Building Inspector in the same department but at a different section. He admitted that he did not make a complaint with the Police that his signature had been forged. **PW2** clarified on re-examination that when shown the document and when he appeared in Court he confirmed that the signature was not his. That he did not need a file to confirm his own signature.
19. The Defense case proceeded on 17<sup>th</sup> October 2015 with Ali Mbarak Ali giving evidence as the sole witness on behalf of the Defendant. He stated that he was the husband of the Defendant testifying on authority of a power of attorney donated by her to represent her in the proceedings. The same was produced as D.ex1. **DW1** narrated that he knew the Plaintiffs as co-owners of the suit building; where everyone owns a flat. He confirmed that the building comprised of four houses situate on three storeys and a ground floor. The Defendant's flat was on 1<sup>st</sup> floor with the Plaintiffs' flats above them.
20. **DW1** continued that they purchased their flat on 11<sup>th</sup> December 1999 from the Plaintiffs' brother, Hussein Aidarus. The building was initially owned by their father. Upon his demise they shared it out in accordance with Islamic Law. Shihabdin Hussein who was also the Defendant's uncle sold to them his interest in the flat pursuant to the agreement produced as **D.Ex 2**. Sometime in 2010, **DW1** wanted to renovate his plot. The grant had been issued to the Plaintiffs' brother and sister who is also deceased. **DW1** wrote to the brother, Aidarus seeking consent which was given. He produced the letters dated 4<sup>th</sup> March 2010 and its response dated 24<sup>th</sup> May 2010 as D.Ex 3 and MFID 4 respectively.
21. Afterwards, they obtained approval from the Municipal Council vide the letter dated 21<sup>st</sup> April 2010 marked as D.Ex 5; a letter from NEMA dated 24<sup>th</sup> April 2010 as D.Ex 6 and an approval from the Mombasa Old Town Conservation Office as D.Ex 7. The renovation was intended to extend their flat to cover the open front area. **DW1** and the Defendant were not able to complete construction because of the Court order. **DW1** was adamant that the construction was legal because all requisite consents had been obtained.
22. On cross-examination **DW1** said that they bought flat no.2 and the unexpired lease. That after the agreement they got a certificate of lease. The head lessor was Asman Hussein and three others. He however did not think that he needed the consent of the head lessor. **DW1** admitted that his wife's name was not included as a sub-lessee. He continued that the letter dated 12<sup>th</sup> March 2010 requesting consent was addressed to three people yet the Grant at the time was held by two; Aidarus and his sister. That it was written after their father's passing.
23. On the disputed consent letter (D.ex 5) **DW1** asserted that it was not true that only Aidarus gave consent. That the Defendant was charged with forgery and was acquitted. He continued that a representative of the Municipal Council testified in the criminal proceedings and that this suit was instituted 4 months after they began construction. The construction was not finished having been stopped as per the Court order. **DW1** denied blocking the ground floor. He asserted that he placed pillars on the ground floor to support his extension and that to date, there is a door allowing access downstairs.
24. The hearing completed, the Court conducted a site visit on the suit property on 12<sup>th</sup> July 2019. During the site visit i made the following observations;
- i) *There is a protruding slab from the building at the first floor.*
  - ii) *The slab is supported by the pillars constructed from the ground floor.*

iii) *There is also a house built below the slab that was occupied.*

iv) *Access to the back of the building is blocked by the additional house on the ground floor.*

25. The parties then filed their final submissions. The Plaintiffs' submissions were filed on 2<sup>nd</sup> October 2019 rehashing the version of events and contended that the construction was illegal as their consent was not sought. That the Defendant was well aware of this requirement under clause 4(c) of his sublease prompting him to seek the consent of Aidarus Hussein Adarus who they asserted was not their agent capable of giving such consent on their behalf. Secondly, the approval by the Municipal Council of Mombasa was a forgery rendering the construction illegal thus warranting its demolition.

26. It was submitted further that the Defendant as the purchaser of the 1<sup>st</sup> floor flat did not get a better right than the previous owner giving her leeway to reconstruct. That she only purchased the flat and there was no agreement signed with the owners of the reversionary interest in the property effecting absolute transfer to her. Hence she had no right to undertake such reconstruction.

27. The Defendant's submissions were filed on 11<sup>th</sup> November 2019. It was submitted that the Defendant was a legal co-owner of the suit property proved by the sale agreement dated 11<sup>th</sup> December 1999 produced as D.ex 2 as well as DW1's testimony. That the sub-lease agreement made by the Plaintiffs on 23<sup>rd</sup> June 2000 was null and void as the late Shihabdin Hussein Aidarus no longer owned the flat. Counsel for the Defendant contended that the Defendant was not only a flat owner but also a co-owner of the leasehold interest together with the Plaintiffs and Aidarus Hussein Adarus, the owner of the ground floor flat.

28. Counsel submitted further that the Defendant's renovation and construction would enhance the property's value and improve the premises hence it was to the benefit of all parties. That consent was obtained from the Plaintiffs' brother, Aidarus Hussein Adarus who then consulted the Plaintiffs as they were abroad with their addresses unknown to the Defendant. Moreover, the said Hussein was in charge of collecting fees for municipal rates hence he had implied authority to give consent in his own right and on behalf of the Plaintiffs. The Defendant asserted that all requisite approvals from the Municipal Council of Mombasa, the National Museum of Kenya and the National Environmental Management Authority were obtained hence the renovation and construction was legally compliant.

29. I have read and reviewed the parties' pleadings, evidence, submissions and the applicable law. The questions arising for determination are;

i. *Whether the Defendant breached the terms and conditions of his sublease by undertaking renovation and construction of his flat*

ii. *Whether the requisite consent to make alterations was sought and issued*

iii. *Whether the Plaintiffs are entitled to the orders sought*

30. The agreement of sale dated 11<sup>th</sup> December 1999 executed by the defendant stated at paragraph 1 & 2 thus; *"The property sold is Flat no 2 on the first floor of the building on title no Mombasa/Block XXXII/4. The interest sold is the leasehold for the unexpired residue of the term of 99 years from 1.11.1984."*

31. My reading and understanding of the two paragraphs is that what was sold was the unexpired leasehold interest in Flat no 2. The defendant alluded that he was a co-owner of the property because he was sold unexpired interest of the title. There was no mention in the agreement about the defendant being made a co-owner. In the certificate of title issued to the defendant dated 25<sup>th</sup> October 2001 has an insert signed by the remaining lessees giving consent to the sub-lease of flat no 2. Under the property section of the certificate of lease, the plaintiffs are referred to as sub-lessor while the defendant is called sub-lessee. The title therefore shows that the plaintiffs and the defendant do not own equal rights in respect of the suit property.

32. Did the defendant breach the terms of the sub-lease executed on 23<sup>rd</sup> June 2000 by building the extension to his flat? **Clause 4(c)** of the sublease required the Lessee not to make any structural alterations or structural additions or remove any of the Landlords' fixtures without prior written consent of the Lessors which consent was not to be unreasonably withheld. The defendant contended that he sought the consent vide his letter dated 12<sup>th</sup> March 2010 addressed to the sublessors. He added that he gave a copy of the same to Aidarus Hussein Aidarus but was unable to deliver the plaintiffs copy because he did not know their address. The defendant annexed the response made by Aidarus Hussein Aidarus giving the defendant consent to carry on with the renovations and the extensions subject to approvals being obtained from the Municipal Council.

33. The Court has been called upon to determine whether or not the consent was properly sought and issued before construction commenced. The Defendant's letter to Aidarus Hussein Adarus (D.Ex 3) requesting the same stated thus:

*"As I have already informed you, I do hereby request for your written consent to carry out renovations/extensions to my flat no 2 on the existing building. As you can observe from the proposed plan, we shall all stand to benefit as our flats would be bigger and flat no. 3 and 4 would have bigger terraces and a better view of the ocean from all sides"*

In the response thereto, Aidarus upon giving consent states as follows:

*"... I hereby on my behalf and on behalf my sisters who are abroad do grant you permission to carry out the proposed renovations and extensions on your flat no 2 as requested..."*

From this exchange, it is evident that the proposed alterations were of a fundamental nature warranting the approval of all lessors. Aidarus did not have a problem with how the construction would affect his flat but he indicated that the Plaintiffs' flats may be affected.

34. It is trite law that he who alleges must prove. It is not in dispute that the plaintiffs did not sign any written consent to the defendant. The burden thus shifted to the defendant to demonstrate that he had approval of all the sub-lessors. Counsel for the Defendant mentioned the witness statement of Aidarus Hussein Adarus but he was not called to give evidence in court. The contents of Aidarus' statement is thus inadmissible as he did not give on oath and also the plaintiffs were not given an opportunity to cross-examine him. The question as to whether he was indeed an implied agent of the Plaintiffs and whether he consulted them would have been established by way of evidence as opposed to mere conjecture. The Defendant's letter in the opening remarks said "*as I have already informed you*" implies that he already informed the addressees in the letter. Yet in his evidence, he stated that he could not contact the Plaintiffs to seek their consent prior to commencing construction because he did not have their addresses.

35. There is was no evidence put forth by the defendant that he made attempts to reach the plaintiffs for purposes of getting their consent. He also did not adduce evidence to show that indeed Aidarus had authority to give consent on behalf of the plaintiffs as he did. I am therefore persuaded to find that the consent of the sublessors obtained was improper as it was not signed by all the sub-lessors. The result is that the renovations and or extensions were done without full authority thus the works were illegally done.

36. Consequently, this court is inclined to agree with the Plaintiffs as stated by PW1 in his testimony that the construction went outside the dimensions as per clause 8 (b), (c) and (d) of the lease. The upshot of the foregoing is that judgment is hereby entered for the Plaintiff in terms of **prayers (a), (b), (d)** of the amended plaint. The plaintiff did not satisfy me that they suffered any damages as a consequence of the constructions hence I award none as sought in prayer **(bb)** and **(c)**. The defendant is granted four (4) months from the date of this judgment to remove the offending structures. In default, the plaintiffs be at liberty to remove the offending structures at the defendant's costs.

37. The cost of the suit is awarded to the plaintiffs.

**Judgement dated & signed at Busia this**

**16<sup>th</sup> Day of September 2020**

**A. OMOLLO**

**JUDGE**

**And delivered electronically via email to the parties' advocates this 21<sup>st</sup> Day of September 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**