



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang, J.)**

**CIVIL SUIT NO. 219 OF 2010**

**MSALLAM SAID ABDALLA.....PLAINTIFF**

**-VERSUS-**

**1. SULEIMAN LAZARI NANGELA**

**2. PHILIPINA LAZARI NANGELA.....DEFENDANTS**

**JUDGMENT**

The plaintiff, in his plaint of **30<sup>th</sup> June, 2010**, pleaded that he was the registered owner of a parcel of land, L.R. No. Mombasa/Block XV/667 situated at Majengo, on which stood a **house-without-land** occupied by the defendants. It was pleaded that the defendants failed and/or refused to pay **ground rent**, in respect of the subject house. The plaintiff then asked the defendants to vacate his parcel of land, which he intended to use as he saw fit; but the defendants took no action on the request.

The plaintiff sought a declaration that the defendants' occupation of a portion of the said parcel of land was contrary to law; he sought an order of eviction and for the restoration to him of possession of the suit property.

As the defendants failed to enter appearance and file a defence, the Deputy Registrar, on **1<sup>st</sup> September, 2010** entered interlocutory judgment against them, at the request of the plaintiff.

Learned counsel **Mr. Mutubia** appeared for the plaintiff, when this matter came up before me, on **1<sup>st</sup>**

November, 2010 for formal proof.

**Msallam Said Abdalla**, sworn and giving evidence as PW 1, said that the suit plot was his property; he had purchased it from one **Fraia Amirali** on **2<sup>nd</sup> April, 2009**; he showed a sale agreement indicating that he had purchased the parcel of land for Kshs. 5,500,000/=; and the property was transferred to his name on **20<sup>th</sup> May, 2009**. At the time of purchase, the suit plot had a “Swahili house” on it, in which 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant were living. When PW 1 asked the defendants to vacate his land, they refused, and this necessitated the commencement of the proceedings herein; PW 1 has seen no title which the defendants would claim to have, in respect of the property. The plaintiff asked the defendants to vacate the suit premises, as he wanted to use it for construction. The defendants failed to comply, but did not show any cause for non-departure.

It is clear that two physical entities form the foundation of this case: (i) a parcel of land, namely L.R. No. Mombasa/Block XV/667; and (ii) a “house-without-land” situate on that parcel of land.

To enable the Court to have a clear picture of the claim herein, **Mr. Mutubia** provided an authority on the concept of “house without land”; this was **Famau Mwenye & 19 others v. Mariam Binti Said**, Malindi H.C.C.C. No. 34 of 2005 (**Ouko, J.**). The learned Judge thus described the concept:

**“The dispute arises from a land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, 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 est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”**

The learned Judge found several earlier decisions from the Coastal area of Kenya, dealing with the concept of ‘house without land’: **Burka Ahmed Salim & Another v. Ahmad Athiman Mohamed**, Mombasa HCCC No. 288 of 1997; **Irene Ngombo Mshingo v. Mariam Kadogo**, Mombasa HCCC No. 82 of 1997; **Ronald Joseph Tilya v. Rahaby Wanjiru**, Mombasa HCCC No. 664 of 1998; and **Leila M. Seif & Another v. Harun Chogo & Others**, Mombasa HCCC No. 51 of 2003.

In the **Famau Mwenye** case, evidence was given that **the plaintiff** had built the suit house on the **defendant’s parcel of land** some 40 years earlier (in 1967), and that since then he had been paying “ground rent” to the defendant. The dispute arose because the defendant kept increasing the ground rent, and at one stage the plaintiff failed to pay the new rents, and so the defendant levied distress.

The learned Judge found that the tenancy relationship between the plaintiffs and the defendants was not set out in any written agreement; but that the terms of ground rent were changed over time by the plaintiffs, on their own — and that this was the local usage.

The learned Judge was of the opinion that “house without land”, in its essence, was a **lease**, which, therefore falls to be defined as provided for under s. 105 of the Transfer of Property Act, thus:

**“A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.**

**“The transferor is called the lessor; the transferee is called the lessee; the price is called the premium; and the money, share, service or other thing to be rendered is called the rent”.**

In the instant case, relying on the foregoing authority, which I find meritorious, I find that the defendant had an **obligation to make some form of payment** to the plaintiff, on such terms as the parties might have agreed. The evidence before the Court is that the defendants failed to make due payment; but that is no longer the issue: the plaintiff seeks to repossess his land, for use as he deems fit.

There is no cause to examine the merits of the plaintiff's claim, as the defendant has lodged no contest. The Court, in the circumstances, must rest its decision on the plaintiff's rights to his property, which are recognized under the **Constitution of Kenya, 2010**, Article 40 (1), and at common law. I therefore find in favour of the plaintiff, and make a decree in the following terms:

**(1) I declare that the defendants' continued occupation of the house-without-land lodged on plot No. Mombasa/Block XV/677, is contrary to law.**

**(2) An order of eviction shall issue against the defendants who shall immediately hand over to the plaintiff vacant possession of Plot No. Mombasa/Block XV/677.**

**(3) The defendants shall bear the plaintiff's costs.**

**DATED and DELIVERED at MOMBASA this 4<sup>th</sup> day of March, 2011.**

**J. B. OJWANG**

**JUDGE**

Coram: **Ojwang, J**

Court Clerk: **Ibrahim**

For the Plaintiff: **Mr. Mutubia**

Defendants **unrepresented**