



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 44 OF 2015**

**ALWI MOHAMED ALWI.....PLAINTIFF**

**VERSUS**

**SWALEH OMAR AWADH.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated 19<sup>th</sup> March 2015 and filed herein on 20<sup>th</sup> March 2015, Alwi Mohamed Alwi (the Plaintiff) avers that he purchased a building on a parcel of land known as Portion No. 4314 Malindi on 21<sup>st</sup> September 2007. At the same time, Swaleh Omar Awadh (the Defendant) purchased another building situated on an adjacent portion of the same parcel of land.
2. The Plaintiff further avers that following the demolition of the old building on his portion and as he prepared to construct another building on the said portion, the Defendant proceeded on 16<sup>th</sup> March 2015 to erect a structure on the portion previously occupied by the Plaintiff's building without the Plaintiff's permission or knowledge.
3. As a result, the Plaintiff prays for a mandatory order of injunction to compel the Defendant to remove the structures built on the Plaintiff's portion as well as an order of eviction of the Defendant from the suit premises.
4. In his Statement of Defence filed herein on 13<sup>th</sup> April 2015, the Defendant on his part avers that he started occupying the suit property in the year 1980 long before a sub-division was effected thereon on 25<sup>th</sup> October 1988. The Defendant denies that the Plaintiff purchased a building on a portion of the property as alleged and asserts that as at 21<sup>st</sup> September 2007, there was no other building on the suitland other than that owned by the Defendant.
5. While admitting that he commenced the process of constructing an extension of his house in March 2015, the Defendant however denies that the construction is being carried out on a portion of land owned by the Plaintiff.

**The Plaintiff's Case**

6. At the trial herein, the Plaintiff called two witnesses.
7. PW1- Alwi Mohamed Alwi(the Plaintiff) told the Court that the registered owner of the main parcel of land being Portion No. 505R were Hilal Mohamed Said Nassor Al-Busaidy, Soud Mohamed Said Nassor Al-Busaidy, Khalifa Mohamed Said Nassor Al-Busaidy and Seif Mohamed Said Nassor Al-Busaidy. Upon sub-division of the said Portion No. 505 R Malindi, the subject property being Portion No. 4314 was created.
8. PW1 told the Court that he purchased a building erected on part of the said Portion No. 4314 from the heirs of the Estate of Fadhil Omar Fadhil on 21<sup>st</sup> September 2007 while the Defendant purchased a different building erected on a different part of the same portion of land. After sometime, PW1 demolished the building that he had purchased and opted to erect another one in its stead in the year 2012.
9. According to PW1, he applied and sought the necessary approvals for the building he intended to put up. It then became necessary since they shared the same land with the Defendant that it be sub-divided. However before he could go on with the plans, PW1 was shocked to find on or about 16<sup>th</sup> March 2015 that the Defendant had proceeded to erect a structure on the Portion where his demolished building had stood. The Defendant has since refused to remove the illegal structures.

10. PW2-Seif Mohamed Said supported PW1's position. He told the Court that he was among the transferees of Portion No. 4089(Original No. 1755/5) alongside his brothers Hilal Mohamed Said Nassor Al-Busaidy, Soud Mohamed Said Nassor Al-Busaidy and Khalifa Mohamed Said Nassor Al-Busaidy.

11. PW2 testified that the said parcel of land was subsequently sub-divided into various parcels of land amongst them portion No. 4314. PW2 told the Court that he was aware of the sub-division of Portion No. 4314 and the buildings thereon one of which belonged to the Plaintiff. He was also aware of the Defendant's trespass into the Plaintiff's portion.

### **The Defence Case**

12. The Defendant testified on his own behalf and did not call any other witness. He told the Court that he was the lessee of the entire Land Portion No. 4314 and he has never shared the suit property with the Plaintiff at any point in time. It was his case that he started occupying the land in the year 1980 after purchasing the house standing thereon. The land was then known as Portion No. 505 Malindi. After the Sub-division which was effected on 25<sup>th</sup> October 1988 the Portion he occupied was re-designed as No. 4314.

13. The Defendant denies that the Plaintiff purchased a building on a portion of the suit property from the Estate of Fadhil Omar Fadhil. According to him, as at 21<sup>st</sup> September 2007, there was no other building within the suit property other than the one owned by himself. While it was true that there used to be a building which was owned by the late Fadhil Omar Fadhil on a small portion of the Original Plot No. 505 Malindi, the same had been abandoned for a very long period of time and was subsequently washed away by the rains.

14. The Defendant admits that he commenced construction of an extension to his house in March 2015 but denies that the extension encroached on a portion owned by the Plaintiff.

### **Analysis and Determination**

15. I have considered the pleadings, the testimony of the witnesses and the evidence placed before me. I have equally perused and considered the submissions and authorities of the Learned Advocates- Mr. Gicharu for the Plaintiff and Mr. Shujaa for the Defendant.

16. The suit property is described by the Plaintiff at paragraphs 3 and 4 of the Plaint as "a Portion of Portion No. 4314/Malindi itself a sub-division of Plot No. 505/Malindi". At the trial herein, the Plaintiff adopted his Written Submissions dated 25<sup>th</sup> August 2015. He testified that on 21<sup>st</sup> September 2007 he purchased a "house without land" standing on a portion of Plot No. 4314 Malindi from the Estate of one Fadhil Omar Fadhil. In support of his case, he produced a Written Sale Agreement dated 21<sup>st</sup> September 2007 between the heirs of the Estate of the deceased and himself as an exhibit.

17. It was the Plaintiff's case that after he purchased the said house, he demolished it sometime in 2012 and made arrangements to erect a new one. As he made arrangements to do so, the Defendant who owns another house within the suit property started constructing an extension on his house. According to the Plaintiff, this extension encroached on the space on which his house originally stood and since the Defendant has subsequently refused to remove the extension, he seeks the intervention of this Court to compel the Defendant to remove the same and permanently cease from dealing with that portion of the suit property.

18. The Plaintiff's case was supported by the brief testimony of Seif Mohamed Said (PW2) a member of the family that owns the suit property.

19. On his part the Defendant testified that the entire suit property was leased to him by the registered owners-the family of PW2. It was his case that he started occupying the land in 1980 after purchasing the house standing on it vide a Written Agreement dated 11<sup>th</sup> November 1980(Dexh 1). Since then, it was his evidence he has been paying ground rent for the same.

20. According to the Defendant, he had leased the suit property before the sub-division of the original Portion No. 505, Malindi. It was the Defendant's testimony that he is a lessee of the entire Land Portion No. 4314 Malindi and that the house which was sold to the Plaintiff was not within the Portion of the land in which his house stood.

21. The dispute between the parties herein is an interesting one as neither party claims ownership of the land upon which they seek to exercise their rights. Even though none of the parties has exhibited title documents to the land, there appeared to be some consensus that the land in dispute belongs to the family of PW2.

22. The concept of a "house without land" which is prevalent in the Coastal region is indeed increasingly becoming controversial, more so under the new Constitutional dispensation and the emerging land law regime. As Angote J pointed out in *Murtahar Ahamed Dahman & Another -vs- Athuman Sudi (2013) eKLR:-*

"The land question within the Coastal region is complex due to its peculiar historical and legal origins. The region is in a very unique position because of its geographical positioning and with it the peculiar historical ties unlike the other parts of the country. It is common knowledge that where a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act Cap 281 has defined land to include things embedded for the permanent beneficial enjoyment of that to which it is attached. However the Land Titles Act, Cap 282 which is applicable to the Coastal region, and which has since been repealed, abrogated partly the Mohamedan Law. Under the Mohamedan Law and the Land Titles Act, Cap 282, a building erected by one person, even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests are, however, supposed to be noted in the certificate of title. It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent."

23. As it were, the operative land statutes do not recognise this concept of a house without land any longer. Indeed one can dare say that the concept as recognized under the repealed Land Titles Act defies the current definition of “land” and “lease” in our laws.

24. Be that as it may be, I note that the Plaintiff herein has based his case on the assertion that he bought his house without land as per an Agreement of Sale dated 21<sup>st</sup> September 2007. A perusal of the Agreement reveals that it was executed between the Plaintiff and the heirs of the Estate of one Fadhil Omar Fadhil. According to PW2 who testified in support of the Plaintiff’s case, the said Fadhil Omar had rented a house from PW2’s family before his death. It was not clear to me whether as a tenant, the said Fadhil Omar and/or his estate could then lawfully transfer the same to the Plaintiff herein.

25. A perusal of the said Sale Agreement further reveals that the impugned house may have been on a different parcel or Portion of the land altogether. This is so because Paragraph 2 thereof refers to a different parcel of land in the relevant portion as follows:-

**“Whereas the Vendors are the rightful heirs at law of the Estate of Fadhil Omar Fadhil who died intestate and was at the time of his death possessed of or otherwise entitled to amongst land properties a house without land situated on Plot 505/R Malindi along Ganda road Malindi....”**

26. As it were the Defendant produced a Deed Plan (Dexh 3) for the Portion of land which shows that a sub-division was carried out on Portion No. 505 on 25<sup>th</sup> October 1988 and that is what created Portion No. 4134 Malindi. From the evidence of both PW2 and the Defendant herein, the Defendant was already on the land at the said time. That sub-division was done some 12 years before the Plaintiff purchased the house as he states on 21<sup>st</sup> September 2007 and I am unable to discern why the Agreement of Sale would have still indicated that the house being sold stands on Portion No. 505/R. That in my view only lends credence to the Defendant’s contention that the Plaintiff’s house was not within Portion No. 4134 Malindi.

27. In my view since the Plaintiff is not the owner of the land, his rights to occupy a Portion of the suit property on which he claimed his house stood ought to be premised either on a lease or sale of that particular portion of land. That Portion of land ought to be properly described and its dimensions given so as to give it a distinct identity.

28. The Deed Plan produced by the Defendant puts the size of Portion No. 4314/Malindi at 0.0558 hectares. It is not disputed that the Defendant’s house stands thereon. The Plaintiff does not in the suit filed before me provide the acreage or dimensions of his portion of the land. Indeed, no survey or other report showing the extent of the alleged encroachment was produced before me.

29. In the absence of clear evidence of the Defendant’s alleged encroachment and/or trespass it was not possible to find fault on the part of the Defendant.

30. The upshot is that I did not find merit in the Plaintiff’s case. The same is dismissed with costs to the Defendant.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**