Sheikh v Kalekye (Environment and Land Appeal E007 of 2025) [2026] KEELC 162 (KLR) (22 January 2026) (Judgment)

Neutral citation: [2026] KEELC 162 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E007 OF 2025

YM ANGIMA, J

JANUARY 22, 2026

BETWEEN

ABDULWAHAB ABRAR SHEIKH .... APPELLANT

AND

MARY KALEKYE .... RESPONDENT

(An appeal against the judgment and decree of Hon. G. Sogomo (PM) dated 17.01.2025 in Mombasa CMCC E2024 of 2021.)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. G. Sogomo (PM) dated 17.01.2025 in Mombasa CMCC E2024 of 2021. By the said judgment, the trial court held that it had no jurisdiction to entertain the dispute and consequently proceeded to strike out both the appellant's suit and the respondent's counter-claim with no order as to costs.

B. Background

2. By a plaint dated 22.11.2021 the appellant sued the respondent before the trial court seeking the following reliefs;

    a. The defendant be ordered to vacate the suit property known as subdivision number 22367 as contained in certificate of title number CR. 75191. (Originally known as Plot No. 144/MN/1 before subdivision).

    b. The court do order that the defendant's swahili house without land erected on the suit property known as subdivision number 22367 as contained in certificate of title number C.R. 75191 (Originally known as Plot No. 144/MN/1 before subdivision) be demolished.

c. The defendant be ordered to pay the plaintiff the outstanding ground rent arrears of Kshs. 348,000 and the accruing ground rent arrears from the time of filing this suit until the same is determined.

d. General damages

e. Special damages

f. Such other or further reliefs that this honourable court may deem fit to grant.

3. The appellant pleaded that he was the lawful owner of subdivision No. 22367 CR 75191 (originally plot No. 144/MN/I) (the suit property). He pleaded that sometime in 1980 he allowed the respondent to construct a Swahili house without land on part of the suit property at an agreed ground rent of Kshs. 1,200 per month. The appellant pleaded that it was further agreed that the said house would be used for residential purposes only and that the ground rent was reviewable with prior notice.

4. It was the appellant's case that sometime in September 2000 he issued a notice to the respondent reviewing the monthly ground rent from Kshs.1,200 to Kshs. 10,000 with effect from 01.01.2021. It was pleaded that the respondent had refused to pay any ground rent since the year 2000 without any lawful justification or excuse. It was further pleaded that despite issuance of a notice to vacate the respondent had failed to yield possession thereby rendering the suit necessary.

5. The record shows that the respondent filed a statement of defence and counter-claim dated 22.02.2023 making a general denial of the appellant's claim. She also filed a counter-claim whereby she conceded the existence of a lease agreement with the appellant for the construction of the said house. It was her case that the agreed ground rent was initially Kshs. 300 per month which she faithfully paid until September 2020.

6. The respondent pleaded that on 29.09.2020 the appellant gave a notice of increment of the ground rent from Kshs. 1,200 to Kshs. 10,000 per month. The respondent considered the increment to be too high or excessive hence she did not agree to pay the amount. She indicated, however, that he was willing to vacate the suit property if the appellant compensated her for the value of the house without land which she assessed at Kshs. 3,500,000/=.

7. As a result, the respondent sought the following reliefs in her counter-claim against the appellant;

a. Special damages of Kshs 3,500,000/=.

b. General damages.

c. Costs of the suit.

d. Interest in a (a) and (b) above at court rate.

e. Any other relief this honourable court may deem fit and just for grant.

8. The record further shows that the appellant filed a reply to defence and defence to the counter-claim dated 26.09.2023. By his reply to the defence, the appellant joined issue with the respondent on her defence and reiterated the contents of his plaint.

9. By his defence to counter-claim, he denied liability for the respondent's counter-claim and put her to strict proof thereof. The appellant pleaded that he sought to increase the ground rent to Kshs.10,000/= per month because the respondent had rented out the house in issue to other tenants for commercial purposes and that she was no longer residing thereon.

10. It was the appellant's case that a Swahili house was a simple and cheap house to construct hence the respondent could not have expended Kshs. 3,500,000/= in its construction. It was pleaded that, in any case, the respondent had already recovered her investment by leasing the house to tenants hence she was not entitled to any compensation upon vacating the suit property.

C. Trial court's decision

11. The material on record shows that upon a full hearing of the suit at which the parties gave their evidence the court found and held that it had no jurisdiction to entertain the suit and counter-claim. The trial court was of the view that the dispute was governed by the *Rent Restriction Act* hence it fell within the jurisdiction of the Rent Restriction Tribunal. As a consequence, the trial court struck out both the appellant's suit and the respondent's counter-claim with no order as to costs.

D. Grounds of appeal

12. Being aggrieved by the said judgment, the appellant filed a memorandum of appeal dated 10.02.2025 raising the following 13 grounds of appeal;

    a. That the learned trial magistrate erred in law and in fact by failing to appreciate the concept of house without land.

    b. That the learned trial magistrate erred in law and in fact by finding that the Honourable Court did not have the requisite jurisdiction to hear and determine the Appellant's suit.

    c. That the learned trial magistrate erred in law and in fact by dismissing the appellant's suit for want of jurisdiction.

    d. That the learned trial magistrate erred in law and in fact in finding that Section 2 (c) of the *Rent Restriction Act* ousted the Honourable Court's jurisdiction to hear and determine the Appellant's suit.

    e. That the learned trial magistrate erred in law and in fact by failing to distinguish the relationship between a land owner and an owner of a house without land from the relationship between a house owner and a tenant.

    f. That the learned trial magistrate erred in fact and in law by failing to find that the *Rent Restriction Act* applies to the relationship between a house. owner and a tenant.

    g. That the learned trial magistrate erred in law and in fact by failing to appreciate that the relationship between a land owner and an owner of a house without land is governed by the *Land Act* and the Transfer of Property Act.

    h. That the learned trial magistrate erred in law and in fact by finding that the dispute between the Appellant and the Respondent relates to tenancy.

    i. That the learned trial magistrate erred in law and in fact by failing to find that the dispute between the Appellant and the Respondent relates to the right of a landowner to evict an owner of a house without land from his or her land pursuant to notice to vacate the said land.

    j. That the learned trial magistrate erred in law and in fact in failing to find that the Appellant served the Respondent with the requisite 90 days' notice to vacate in terms of Section 152E of the *Land Act*.

k. That the learned trial magistrate erred in law and in fact by failing to find that the Respondent became a trespasser on the Appellant's land when he continued to occupy the said land after the expiry of the 90 days' notice to vacate.

l. That the learned trial magistrate erred in law and in fact by failing to order the Respondent to vacate the Appellant's land and demolish her house without land.

m. That the learned trial magistrate wholly and completely disregarded the evidence as led by the Appellant together with his written submissions summarizing the evidence, applicable law and case law hence arriving at an unjust decision.

13. As a result, the appellant sought the following reliefs in the appeal;

a. That the appeal be allowed.

b. That the judgment of the trial court dated 17.01.2025 be set aside.

c. That the appellant's suit before the time court be allowed.

d. That costs of the appeal be borne by the respondent.

E. Directions on submissions

14. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the appellant filed submissions dated 05.08.2025 but the respondent's submissions were not on record by the time of preparation of the judgment.

F. Issues for determination

15. Although the appellant listed 13 grounds in his memorandum of appeal dated 10.02.2025, the court is of the view that the central issue is whether or not the trial court erred in law in holding that it had no jurisdiction to entertain the dispute before it on account of the provisions of the *Rent Restriction Act*. The ancillary question for determination is the issue of costs.

G. Analysis and determination

16. The court has considered the material on record and the appellant's submissions in this appeal. The appellant submitted that the trial court erred in law in holding that it had no jurisdiction to entertain the suit before it because the relationship between the parties was not that of a landlord and tenant. It was contended that the relationship between the parties was that of a landowner and a licensee. The appellant relied, inter alia, upon the cases of Abdukrazak Khalifa Salimu vs Harun Rashid Khator & 2 Others [2018] eKLR and Christopher Baya & 2 Others vs Philip Kiluko [2004] eKLR.

17. The preamble to the *Rent Restriction Act* states that it is;

> "An Act of Parliament to make provision for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house."

18. The court is of the view that there was no landlord - tenant relationship between the parties which related to the letting of a dwelling house within the contemplation of the Act. The pleadings and

material on record demonstrate that the appellant was simply a landowner who had allowed the respondent to construct a house without land on the suit property. The appellant was not the owner of the house hence the respondent's obligation was restricted to payment of ground rent for use of a portion of the suit property.

19. The court is thus satisfied that the relationship between the parties was akin to a leasehold which was previously governed by Section 105 of the Indian Transfer of Property Act (ITPA) (now repealed). In the case of Abdukrazak Khalif Salimau(supra) the Court of Appeal while considering the concept of a house without had held, inter alia, that;

> " 21. On the issue whether the appellant as owner of a house without land is entitled to Notice under Sections 3, 8, 51, 105, 106 and 108 (h) of the Transfer of Property Act, we are persuaded by the dictum in Famau Mwenye & 19 Others vs. Mariam Binti Said, Malindi High Court Civil Case No. 34 of 2005, where the trial judge likened the concept of house without land 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". A lease can be determined by either effluxion of time or notice given by either party in accordance with the lease agreement or as stipulated by law in reference to the period in which rent is paid.

20. The Court of Appeal further considered the manner of termination of said relationship as follows;

    23. On the question whether an owner of a house without land is entitled to a Notice to terminate the tenancy or permission to own the house without land, we are of the considered view that an owner of a house without land is entitled to Notice. This is pursuant to the provisions of Section 106 of the ITPA.

    24. The next issue for our consideration is whether in the instant case, such notice was given. The appellant contends that no notice was given. In contrast, the respondents contend that notice was given more specifically at the time the Masjid Rahma mosque was told not to accept any rent from the appellant. The trial court in its judgment gave the appellant three (3) months' notice to remove the house without land. It is not disputed that the appellant has never paid rent for the house without land since 2003. It is also not in dispute that whoever erected or constructed the house without land on the suit property did so with the consent and permission of the registered proprietor. In the instant appeal, the house without land having been erected by consent, the continued presence of the house on Plot No. 3891 can only be with the consent of the registered owner of Plot No. 3891. This being so, the respondents as registered owners of Plot No. 3891 have a right in law to withdraw and terminate the permission or consent granted to have the house without land on the suit property. We are of the considered view that when the respondents informed the Masjid Rahma mosque not to receive any rent from the appellant, they unequivocally expressed the intention to terminate the appellant's continued presence in and occupation of the suit property.

21. The court is thus satisfied that the trial court erred in law in equating the relationship between the parties to a landlord - tenant relationship governed under the *Rent Restriction Act*. The court is further satisfied that the trial court erred in law in holding that it had no jurisdiction to entertain the suit and counter-claim on account of the provisions of the said Act. As a consequence, the court is satisfied that the appellant's appeal has merit and the same ought to be allowed.

22. On the issue of costs, the court is of the view that none of the parties were responsible for the state of affairs in which they found themselves. The error of law in declining jurisdiction was committed by the trial court. As such, the court is of the view that none of the parties should be penalized in costs. The order on costs which commends itself to the court is for each party to bear his own costs of the appeal.

H. Conclusion and disposal orders

23. The upshot of the foregoing is that the finds merit in the appeal. Consequently, the court makes the following orders for disposal of the appeal;

    a. The appeal be and is hereby allowed.

    b. The judgment of the trial court dated 17.01.2025 in Mombasa CMCC No. E20246/2021 is hereby set aside in its entirety.

    c. The appellant's suit as well as the respondent's counter-claim are hereby reinstated for hearing on merit.

    d. The matter is hereby remitted back to the Chief Magistrate's Court for hearing before any available magistrate.

    e. Each party shall bear his own costs of the appeal.

    It is so decided.

JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 22ND DAY OF JANUARY 2026 IN THE PRESENCE OF THE PARTIES AS INDICATED BELOW.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Iddi for the Appellant

Mr. Adika for the Respondent