



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 37 OF 2014**

**SUDI ALI RASHID.....PLAINTIFF**

**-VERSUS-**

**RUTH alias RAYA JEREMIAH ATIENO.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff commenced this suit against the defendant vide his plaint dated 20.2.2014 and filed in Court on 24<sup>th</sup> February 2014 asking the Court to grant him the following prayers:

**(a) This Honourable Court to declare that the suit property belongs to the Plaintiff and his brothers *Rashid Ali Rashid* and *Hassan Ally Rashid*.**

**(b) A mandatory injunction against the Defendant, her agents, employees and or servants to quit, vacate and or hand over vacant possession of the suit property to the Plaintiff.**

**(c) In the alternative, an order of eviction against the Defendant, her agents, employees and or servants from the suit property.**

**(d) Any other relief that the Court may deem fit and reasonable to grant.**

**(e) Costs of this suit.**

2. In the plaint, it is pleaded that the plaintiff together with his brothers have been registered as the owners of a parcel of land Mombasa/Block XII/301 measuring 0.0203 ha (**herein referred to as the suit property**). That the plaintiff and his two brothers erected two self-contained houses on the suit property and were in the process of putting an additional floor. The plaintiff pleaded that sometime in 2013, the defendant trespassed on this property and took over possession thus necessitating the filing of this suit. Together with the plaint was filed a set of documents to wit **copy of title deed, notification of approval dated 15<sup>th</sup> January 2008, house without land transfer form and a bundle of receipts.**

3. The suit is defended wherein the defendant denied the plaintiff's claim in toto and proceeded to counter-claim against the plaintiff via her statement of defence and counter-claim dated 31<sup>st</sup> March 2014. The defendant pleaded that she has lived on the suit property from 1970 to date and that it constitutes her matrimonial home. The plaintiff denied the issues raised in the counter-claim vide his reply dated 14.4.2014. After pleadings closed, directions were taken and the matter listed for hearing. The plaintiff was a sole witness while the defendant called two witnesses.

4. On 5<sup>th</sup> October 2015, the plaintiff presented his evidence to prove his case. He said that he lives near Kongowea while the defendant lives in their house in Majengo without their consent. That they are 3 brothers who have a title deed to show the land belongs to them. That they got the land in 1982 having purchased it from Juma Nassor. They have developed it with a house. The witness said the defendant is his step-mother. That the defendant got into the premises in January 2013. He urged the Court to grant him the prayers sought in his plaint.

5. During cross-examination, the plaintiff stated that he was born in 1975 and by 1982, he was 7 years old. Rashid Ali Rashid was born in 1960 while Hassan Rashid was born in 1964. His father died on 22<sup>nd</sup> March 2015. He remembers seeing the 3<sup>rd</sup> party application brought by the defendant seeking to join his father to the proceedings but his father was already sick by then. He denied that the suit property was given to the defendant by his late father. He was aware the suit property was included in the succession cause of the estate of their father. The plaintiff denied the defendant has renovated the premises. That building of the houses was completed in December 2012. He denied that they took over the property to deny others their right of inheritance. He also denied that the suit property was purchased by their father from Swaleh Nguru. In re-examination, the witness stated that the defendant did not contribute in building the houses on the suit property. With that the plaintiff closed his case.

6. The defendant opened her case on 1<sup>st</sup> November 2016. She testified that the plaintiff is her step-son. They were two wives to Rashid who died in 2015. She knew the suit plot as that is where she lived from 1970. That she was told by the deceased the house was his. They lived on the suit plot without any problem until her husband became very ill. He was taken by the children from the 1<sup>st</sup> house for treatment. That while he was still sick, she was brought a letter informing her the suit premises is not hers. That she visited Swale Nguru who showed her documents that the plot was owned by Rashid & others. That she used to work with Doshi and when she retired she was paid gratuity. She used monies paid to her to repair the houses on advice from her husband.

7. That the 1<sup>st</sup> wife lived in Nyali on a house also owned by the deceased. She did not know how the plaintiff acquired the title of the property into their names. That the plaintiff are taking advantage of her husband's death to disinherit her. She produced a marriage certificate showing they wedded in 1996 (Dex 1) and the plaintiff's demand letter as Dex 2. She also produced documents to show she was paid some money as Dex 5(a) – (d) & Dex 6. That she used these monies to complete the ground floor which was incomplete. She also produced birth certificates of her children as Dex 7 (a) – (c). That her husband left behind about six (6) houses which have all been inherited by the 1<sup>st</sup> house family. This is what she knows as home and urged the Court to allow her to retain it.

8. In cross-examination, DW 1 said she was married in 1996 under Islamic law. She did not have an independent witness to confirm that she has lived on the land since 1970. That the deceased was sick between 2013 – 2015. That Dex 6 (b) did not have the Seal of Doshi but added that even without a seal, the document can still be authentic. That her children were born before the marriage hence according to Islamic law they are illegitimate. That the plaintiff's title was issued in 2007 while her husband was okay. The deceased did not transfer the property to her.

9. Sheri Ali, the daughter of the defendant testified as DW 2. She said the house was given to her mother in 1996 when her father recognized her as his wife. That DW 1 used her retirement benefits to renovate the said house. She was therefore surprised by the plaintiff's claim. In cross-examination she said she was born in 1972. She had no documents of transfer of the suit property to her mother. With these evidence, the defendant closed her case and parties took mention date for filing written submissions.

10. The plaintiff through his advocates filed their written submissions on 9<sup>th</sup> October 2017. The defendant did not file the submissions within the set timelines or at all. The plaintiff raises the following questions for determination:

**1. Whether the Plaintiff or Defendant is the registered owner of the suit property.**

**2. Whether the Plaintiff was genuinely registered as the owner of the suit property.**

**3. Whether the suit property is the matrimonial home of the Defendant.**

**4. Whether the Defendant trespassed and let out the suit property.**

**5. Whether the Plaintiff erected the two self-contained houses in the suit property.**

The plaintiff submitted on the provisions of Article 40 that provides that every person has the right to acquire and own property of any description in any part in Kenya. He also submitted on section 23 of the Land Registration Act No 3 of 2012 which states that registration is conclusive evidence of ownership. The plaintiff further submits that the defendant's claim for adverse possession also fails because it does not apply to land before registration. He made reference to a quote in the case cited of **Mbiru vs Gachuhi (2002) CA 138**. The plaintiff also submitted on damages. He again urged the Court to allow his suit.

11. From the evidence on record, this is a clear case of family squabble with either party claiming the suit property. The plaintiff avers that he is entitled to the land by virtue of being the registered owner of the property. The defendant opposes this averment contending that the plaintiffs acquired title into their names in unclear circumstances and backdated the title. That she had seen the title documents in the name of her husband who had agreed to transfer the same to her. She however did not produce any document to show that the title deed was at one time in the name of her husband named Rashid - deceased.

12. The plaintiff presented to the Court a transfer of a house without land dated 18<sup>th</sup> June 1982. The transfer of house without land however does not amount to transfer of the land itself. Secondly 1982, the plaintiff was a child therefore his name may have just been included by his brothers Rashid Ali & Hassan Ali. On 13<sup>th</sup> September 2007, they obtained a title deed in their names and got a notification of approval for development permission on 15.1.2008. This Court however takes note that as at 1982, there was already a house on this land which was sold under the practice of a house without land concept in the coastal region to the plaintiff and his brothers before the subsequent proposed development that was approved in January 2008. The plaintiff stated that they finished building the suit premises in December 2012 and the defendant took occupation in January 2013.

13. The question that remains unanswered in the Court's mind is; if the plaintiff does recognize the defendant as a wife of his late father and that the defendant and his father was not living on the suit property before January 2013, then on which plot were they living on? I am of the view that this question ought to have been answered and proved by the plaintiff to counter the defendant's claim to the land that it was matrimonial her home/property. It is the plaintiff's burden to prove that the defendant's act living on the land amount to trespass by demonstrating that indeed the defendant moved onto the suit plot in 2013 and not earlier without their permission to do so.

14. The defendant has produced a marriage certificate confirming that she was married to the plaintiff's father in 1996. Although it is her evidence that she was married in 1970, the certificate indicates the wedding was conducted on 22<sup>nd</sup> January 1996. She also stated that she was living on the suit property as her matrimonial home. The plaintiff stated that the defendant was living on a nearby plot but he did not explain what plot number it was, whether the defendant and his father were living on this unnamed plot as owners or tenants and for how long. I am persuaded that it is the defendant who has said the truth that she has always lived on the suit plot as her home.

15. I have various reasons for believing the defendant. First, when the house without land was bought, the plaintiff was only seven (7) years old. He was incapable of making any monetary contributions towards the purchase of the said plot. His brothers who are joint owners that were of majority age at the time of the purchase of the house and probably capable of providing the purchase price did not participate in this suit either by signing authority letter to the plaintiff to bring the suit or at least giving evidence to corroborate the evidence of the plaintiff on allegations of trespass. Further the notification of approval of

the application for development permission dated 15<sup>th</sup> January 2008 is addressed to Ali Rashid Munungi which from the pleadings and evidence presented to the Court is the father of the plaintiff and husband to the defendant. This then lend credence to the defendant's evidence that she used monies received from her gratuity to improve the ground floor of the house on permission and assurance from her husband (now deceased).

16. The plaintiff produced bundles of receipts most of which are dated from May 2012 upto 14<sup>th</sup> March 2013 for purchase of some building materials. The receipts added together amounts to approximately under Kshs 500,000= . In the absence of copies of approved plans in the plaintiff's name evidence of reasonable expenditures incurred during the construction and the development permission not in the plaintiff's name, I find his case wanting in demonstrating that he is indeed the one who developed the houses in question which he says was completed by December 2012.

17. This Court is alive to the provisions in section 24 of the Land Registration Act that registration confers ownership. Similarly section 28 of the same statute provides that ***“unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without being noted on the register –***

***(a) Spousal rights over matrimonial property***

***(b) Trusts including customary trusts.”***

Therefore although the plaintiff is registered as co-owner of the suit property together with his brothers, for him to get the orders he is seeking from the Court, given the relationship between him & the defendant, he was under duty to prove the allegations of trespass committed by the defendant since he who alleges must prove.

18. The evidence on the contrary show that there is constructive trust that was created in favour of the defendant by virtue of her occupation of the suit property as her matrimonial home. The trust though not noted in the register has extinguished the rights of the plaintiff and his brothers. In the case of **John Gitiba Buruna & Another vs Jackson Rioba Buruna Kisumu Civil Appeal No 89 of 2003**, the Court of Appeal stated at page 9 – 10 thus, ***“Generally speaking, a constructive trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him to assert a full beneficial ownership of the property.”*** This is the only place the defendant knows as her home. Consequently it is the defendant that ought to be registered in place of the plaintiff and his brothers who have their home in Mkomani – Nyali where their mother lives besides other properties owned by their late father.

19. In conclusion, it is my finding that the plaintiff's claim fails and is hereby dismissed. The defendant's claim as contained in the counter-claim succeeds in terms of prayer (a). With that I do make an order that the registration of the plaintiff and his brothers Rashid Ali Rashid and Hassan Ally Rashid be and is hereby cancelled. In their place, the District/County Land Registrar Mombasa is directed to enter the name of Ruth alias Raya Jeremiah Atieno as owner of the land title No Mombasa/Block XII/301 forthwith. I will not make an order for mesne profits as the defendant is the one in possession. The defendant is also awarded costs of this suit.

**Dated, signed & delivered at Mombasa this 31<sup>st</sup> January 2018.**

**A. OMOLLO**

**JUDGE**