



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 227 OF 2014

JUMA MZEE ALI & 43 OTHERS.....PLAINTIFFS

-VERSUS-

1. AL MOHAMED HATIMY

2. PETER KINYUA..... DEFENDANTS

JUDGMENT

1. The Plaintiffs moved this Court by way of a Plaint dated 14th November 2008 in which the Plaintiffs are praying for the following reliefs:

a. A Mandatory Injunction restraining the 1st and 2nd Defendants from auctioning their Swahili houses standing on PLOT NO.143/1/MN KONGOWEA MOMBASA.

b. Costs and interest of the suit.

2. The Plaintiffs have averred in the plaint that at all material times to this suit, they are the owners of Swahili houses standing on PLOT NO.143/1/MN KONGOWEA MOMBASA under the coastal land phenomena known as “*House without land*.” That they have occupied the Suit Land for over 20 years and have various businesses going on in their houses and that the houses are their source of livelihood and accommodation.

3. The Plaintiffs further aver that on 23rd October 2008, the 2nd Defendant issued them with proclamation of attachment of their Swahili houses claiming arrears in terms of ground rent and their premises were to be sold. The Plaintiffs further aver and state that PLOT NO.143/1/MN was the subject of MOMBASA HCCC NO.33 OF 2003, KALIDA KANJI (AFRICA) LTD – V- ALHAD MOHAMED HATIMY, said TWAHIR MOHAMED HATIMY and 2 Others over its ownership while there were other cases pending between the Plaintiffs and KALIDAS KANJI & CO LTD in the subordinate Court being RMCC NO. 3063 of 2003 Kalidas & Co Ltd –v- Mzee Bin Ali; RMCC NO.3066 OF 2003, KALIDAS KANJI & CO. LTD –V- JOHN KARIUKI AND RMCC NO.3057 OF 2003, KALIDAS KANJI & CO LTD –V- MOHAMED BAKARI, all in which KALIDAS KANJI & CO. LTD was claiming ground rent from the Plaintiffs in respect of the suit plot.

4. The Plaintiffs state that they do not know the real owner of PLOT NO.143/1/MN between KALIDAS KANJI (AFRICA) LTD and ALHAD MOHAMED HATIMY as both claimed ownership of the plot.

5. It is the Plaintiffs contention that their Swahili houses cannot be distressed and sold in an auction sale like household commodities to recover rent without going through proper proceedings in a competent Court of law. They further aver and state that they are strangers to the 1st Defendant and the ground rent demanded from them is without basis and a sham. The Plaintiffs claim against the Defendants is for Mandatory Injunction to issue against the Defendants stopping them from selling the Plaintiffs’ Swahili houses without any colour of right.

6. The 3rd Plaintiff, Stephen Mwandoro Iha informed the Court that they built Swahili houses on PLOT NUMBER 143/1/MN KONGOWEA MOMBASA under the coastal phenomena known as “*house without land*”. That the Plaintiffs continue to reside and utilize the said Swahili houses as their bode and source of livelihood, and have lived on that plot since 1952. PW1 further stated that on 23rd October 2008 they received proclamation of attachment of their Swahili houses from the 2nd Defendant on account of accrued ground rent.

7. According to PW1, the Plaintiffs are total strangers to the claims by the 1st Defendant as being the owner of PLOT NUMBER 143/1/MN. He stated that the one they have always known to be the owner is one Khalidas Khanji. The Plaintiffs also dispute the amounts claimed in the proclamation notice as the Plaintiffs were not involved in the tabulation of the same and that they do not know what informed

the realization of the said sum which on the face of the notices produced as exhibits shows either Kshs.42,000 or Kshs.72,000.

8. PW1 testified that some of the Plaintiffs have been sued in the subordinate Court over ground rent by one Kalidas Kanji, and therefore the Plaintiffs are confused as to who is the rightful party to pay the ground rent to. He added that the Plaintiffs have all along wanted to negotiate with the owner of the property with a view to purchasing it but that the Plaintiffs have not seen the rightful registered owner. PW1 further stated that the Plaintiffs have set up a self-help group to enable them raise funds with the hope of settling the accrued ground rent and/or to utilize in purchasing the property. It is the evidence of PW1 that prior to proclamation; they have never received any notice from the 1st Defendant in which he identified himself as the rightful legal owner.

9. The Defendants entered appearance through their advocates on record M/s Moses Mwakisha & Company Advocates but did not file defence within the requisite time or at all. The Defendants case was closed without any witness giving evidence.

10. Ms. Chala, Counsel for the Plaintiffs filed written submissions together with authorities on 12th January 2018. The Plaintiffs' Counsel submitted that the intended sell of the Plaintiffs' Swahili houses was illegal as the houses are immovable permanent structures which cannot be proclaimed and sold without a Court order. Counsel cited the case of **Harveys Bar & Restaurant Ltd –v- Fernando Visch HCCC No.59 of 2002** in which the learned judge stated as follows:

“Thus the law is clear that even if the tenant had rent arrears due and was not repairing the premises and even if the landlord had clause 3(c) of the lease to his advantage still in order to effect re-entry it needed to go to Court of law or tribunal, obtain the necessary orders for eviction and then execute the same instead of just marching into the premises and carrying out eviction without any Court or tribunal order.”

11. The Plaintiffs advocate submitted that the 1st Defendant failed to prove that he was the owner of the Suit Property and therefore cannot claim any interest on the property such as land rent from the Plaintiffs. Counsel submitted that the proclamation and sell of the Plaintiffs' house could only be done with a Court order. Secondly, she submitted that the same was illegal as there was no prior demand made by the 1st Defendant. In addition, counsel submitted that it was never brought to the Plaintiffs attention how the land rent tabulations were done, and neither the rate nor period in which the rent remained outstanding was provided.

12. The Plaintiffs advocate also referred to the opinion of Bosire J (as he then was) in the case of **Bella Maison Limited –v- Yaya Tours Ltd, HCCC No.2225 of 1992** who stated:

“The position in law as I understand it is that a person who shows he is entitled to a mandatory injunction must not be compelled to take damages in lieu.... Nor must a wrong doer be permitted to benefit however remotely from his wrong doing more so where the wrong is blatant or where the act of the wrongdoer is contrary to law. In cases where the conduct of the defendant is contrary to law the Court has no discretion. By shutting its eyes to the act the Court will in effect be indirectly sanctioning it.”

13. The uncontroverted evidence before me is that the Plaintiffs are the owners of houses without land constructed on **PLOT NUMBER 143/1/MN**. It has not been disputed that the Plaintiffs have been residing and utilizing the said houses for several years and have been paying monthly ground rent. The Plaintiffs however contend that the 1st Defendant who instructed the 2nd Defendant to issue proclamation of attachment of their Swahili houses is a total stranger to them as he has not shown them any evidence of ownership of the suit plot. It is further the Plaintiffs contention that one Khalidas Khanji has brought up various claims against the Plaintiffs over non-payment of ground rent of the suit plot and the plaintiff have always known the said Khalidas Khanji as the rightful owner. The Plaintiffs were therefore surprised when their houses were proclaimed under instructions from a different person who was not Khalidas Khanji.

14. It is further the plaintiff's contention that they were never issued with any notice prior to the proclamation of attachment. Moreover, the Plaintiffs added, the proclamation did not specify the period for the alleged outstanding ground rent and how the tabulations were arrived at.

15. In the case of **Murtahar Ahamed Dahman & Another –v- Athuman Sudi (2013) eKLR** Angote J, had the following to say regarding the concept of a house without land:

“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 part of the country. It is common knowledge that were 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 thing embedded for the permanent beneficial enjoyment of that to which it is so attached. However, the Land Title Act Cap 282 which is applicable to the coastal region, and which has since been repealed, abrogated partly the Mohammedan Law. Under the Mohammedan 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.

The concept of owning a house or coconut trees by a person who is not the owner of the land was and still being used by absentee landlords to either generate an income for themselves or to forestal the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years. This interesting concept of “owing a house or coconut trees without land” as recognized under the Land Titles Act, which was enacted in 1908, was followed up by the enactment of the Eviction of Tenants (Control) (Mombasa) Ordinance Cap 298 which came into effect on 31st December 1956 and lapsed on 31st December

1969. Section 2 of the Ordinance defined a “house” to mean any building or erection used as a piece of residence and constructed on land which is not owned by the owner of such building or erection.

Although the Ordinance lapsed in 1969, many people in the coastal region and especially within Mombasa Municipality still own houses without land. The owners of those houses pay a monthly rent to the owner of the land. ”

16. The Defendants have not disputed the averments and testimony by the Plaintiffs that they have their Swahili houses erected on **PLOT NO.143/1/MN** under the phenomena of house without land and have been paying monthly ground rent to persons other than the 1st defendant.

17. Section 107 of the Transfer of Property Act 1882 of India provides that a lease of an immovable property from year to year, or for any term exceeding one year or in respect of which one yearly rent is reserved, can only be made by a registered instrument. The site acquired by the Plaintiffs for the erection of their houses under oral agreements are not under registered instruments. Where a party enters upon the land of another and erects a building with the permission of the land owner, such lease, tenancy or licence can be determined by giving 30 days’ notice, requiring the house owner to remove his house and restore the land to the state it was before entry.

18. In **Arif –v- Jadunath Majdma (1930) Vol. VII Indian Appeal. 91, QC)** the privy council construing Section 107 and 108 of the Indian Transfer of Property Act, 1882 held as follows:

“An enforceable verbal agreement to enter upon another’s land and erect a house which is not registered as required under Section 107 and 108 of the Transfer of Property Act of India 1882 does not give rise to equity capable of protection by a Court, and the land owner would be entitled to possession through the order of ejectment after a month’s notice to remove his structures and restore the land to its original state.”

19. In **Said Bin Seif –v- Sharif Mohammed Sharty (1940-1) part II, Vol. XIX, KLR 9, Lucie Smith J,** examined the distinction between ‘Sharia’ Law and the provisions of Section 108 of the ITPA as follows:

“Having so far as possible examined the sharia as regards living, I have come to the conclusion that the main difference between its principles and those of Section 108 of the Transfer of Property Act 1882 of India is that under the latter, the lessor has the option of retaining the building upon payment of compensation while under sharia, the tenant may at his option (1) keep the house and continue to pay (ground) rent, (2) remove the house on payment of compensation, or (3) purchase the land by paying the value thereof.”

20. The Plaintiffs have stated that they do not have any objection to continue paying the ground rent to the rightful owner of the suit plot. They have also expressed their intention to purchase the land from the rightful owner. I take judicial notice that under the Land Titles Act (repealed) the peculiar phenomenon of “houses without land” were recognized that those properties belong to the Plaintiffs. Accordingly they could not be attached and sold by the Defendants or indeed the owner of **PLOT NO.143/1/MN** without notice given to the Plaintiffs.

21. For the above reasons, the Court finds that the Plaintiffs case is merited. I am satisfied on the evidence placed before me that the Plaintiffs have proved their case against the Defendants on a balance of probabilities. Accordingly, I enter judgment for the Plaintiffs against the Defendants in terms of prayers (a) and (b) of the Plaintiff.

It is so ordered.

Delivered, signed and dated at Mombasa this 9th April, 2018.

C. YANO

JUDGE