



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 358 OF 2016**

**MUSA SALIM CHAI**

**SALIM CHAI.....PLAINTIFFS**

**VERSUS**

**ZAKAYO KAIYA KAIBUNGA.....DEFENDANT**

**JUDGMENT**

1. By a Plaintiff dated and filed herein on 23<sup>rd</sup> December 2016, Musa Salim Chai and Salim Chai pray for Judgment against the Defendant for:-

***a) Vacant possession of all that Plot No. 69(Original No. 412) Muyeye Water Project within Malindi town together with the house standing on the said Plot;***

***b) Payment of Mesne profits on account of all rental income collected from the said house;***

***c) A permanent injunction restraining the Defendant by himself, his servants and/or agents from continuing to collect rental income from the said house and from selling, charging and/or alienating the said house to any other person other than the 1<sup>st</sup> Plaintiff and from dealing with the said house to any other person other than the 1<sup>st</sup> Plaintiff and from dealing with the said house in any manner and from continuing to remain in possession of the said Plot;***

***d) Costs of this suit;***

***e) Interest thereon at Court rates; and***

***f) Any other relief that this Court may deem just to grant***

2. The said prayers are premised on the Plaintiff's contention that the 1<sup>st</sup> Plaintiff is the proprietor of the house standing on the said Plot No. 69 (Original No. 1 412) Muyeye Water Project, Malindi while the 2<sup>nd</sup> Plaintiff is the owner of the Plot of land on which the house stands.

3. It is the Plaintiffs' case that sometime in the year 2007, the 2<sup>nd</sup> Plaintiff gave the 1<sup>st</sup> Plaintiff permission to construct a residential house on the land for the 1<sup>st</sup> Plaintiff's use and benefit. Pursuant to the said permission, the 1<sup>st</sup> Plaintiff constructed the house which he rents out to tenants on a monthly basis.

4. It is further the Plaintiff's case that on or about 12<sup>th</sup> June 2012, the 1<sup>st</sup> Plaintiff entered into an agreement with Zakayo Kaiya Kaibunga, the Defendant herein in which the Defendant advanced a sum of Kshs 252,000/= to the 1<sup>st</sup> Plaintiff on the express condition that the 1<sup>st</sup> Plaintiff shall surrender his said house as security for the loan. The 1<sup>st</sup> Plaintiff was to repay the loan within 30 days failure to which the house would be sold to recover the money advanced.

5. The 1<sup>st</sup> Plaintiff defaulted in the loan repayment and the Defendant proceeded to take over the ownership of the house, a situation which the Plaintiffs contend was not contemplated in the agreement between the 1<sup>st</sup> Plaintiff and the Defendant and hence this suit.

6. On his part and by a Written Statement of Defence filed herein on 22<sup>nd</sup> February 2017, the Defendant denies the averments contained in

the Plaintiff and states that upon expiry of the agreed thirty days, the Plaintiffs never approached him to explain that there was going to be any delay in the payment.

### **THE PLAINTIFFS' CASE**

7. During the trial, the two Plaintiffs testified in support of their case.

8. PW1 –Musa Salim Chai testified that Plot No. 69 Muyeye Water Project belongs to his father, the 2<sup>nd</sup> Plaintiff. Sometime in the year 2007, the 2<sup>nd</sup> Plaintiff gave him permission to construct a house on the land. He built a house thereon consisting of ten rooms which he leased out to tenants.

9. PW1 further testified that on 12<sup>th</sup> June 2012, he entered into an agreement with the Defendant in which the Defendant advanced to him a sum of Kshs 252,000/= on the express condition that he surrenders the house as security for the said loan. Due to financial constraints, PW1 testified that he was unable to repay the loan as agreed within thirty days. The Defendant then proceeded to assume ownership of the house together with the Plot of land on which it was built.

10. PW1 further told the Court that the Defendant proceeded to have the said Plot of land transferred from the name of the 2<sup>nd</sup> Plaintiff to his own and that even after he got the money to repay the loan, the Defendant declined to accept the same. Even after the 2<sup>nd</sup> Defendant succeeded to rectify the transfer and had his name restored on the register as the owner of the Plot of land, the Defendant has declined to hand over vacant possession of the land to the 2<sup>nd</sup> Plaintiff.

11. PW1 testified that he continues to suffer loss of rental income and that the Defendant collects Kshs 25,000/= every month from the tenants. PW1 therefore urged this Court to grant vacant possession and to compel the Defendant to refund the sum of Kshs 25,000/= he collects as rent from the year 2012 until payment in full.

12. On his part PW2-Salim Chai told the Court that he is the father of the 1<sup>st</sup> Plaintiff. He largely reiterated the 1<sup>st</sup> Plaintiff's testimony herein and told the Court that even after giving his son permission to construct a residential house on the land, the Plot in question remained his property.

13. PW2 testified that he was not a party to the loan agreement between the 1<sup>st</sup> Plaintiff and the Defendant. He further told the Court that he never offered his land as security for the loan that was advanced to the son and that when he realised that the Defendant had had his name removed from the register, he complained to the authorities and his name was reinstated in the register as the owner of the Plot No. 69.

### **THE DEFENDANT'S CASE**

14. Testifying on his own behalf, DW1-Zakayo Kaiya Kabunga told the Court that he entered into an agreement with the 1<sup>st</sup> Plaintiff wherein he lent him the sum of Kshs 252,000/- The said loan was to be repaid in thirty days failure to which the residential house on Plot No. 69 Muyeye which belonged to the 1<sup>st</sup> Plaintiff, was to be surrendered to himself.

15. DW1 further testified that the 1<sup>st</sup> Plaintiff never paid the money as agreed or at all. Instead the Plaintiff gave several cheques to DW1 but all were dishonoured due to insufficient funds in the Plaintiff's account. When he realised that the 1<sup>st</sup> Plaintiff had no plans to paying him, DW1 took over the house with the full knowledge of the 1<sup>st</sup> Plaintiff, who even wrote an authorization letter to the Chief Engineer of Kenya Power authorizing DW1 to apply for electricity supply to the house.

16. It was DW1's case that thereafter, he proceeded to renovate the house and has since been maintaining the place and paying all utility bills. He told the Court that he continued enjoying quiet possession of the house until December 2016 when the Plaintiffs wrote to him informing him that he was now willing to pay the sum of Kshs 252,000/-. DW1 declined to accept the payment since he had followed their agreement and had spent a lot of money to apply for electricity, to renovate the house and to pay utility bills.

### **ANALYSIS AND DETERMINATION**

17. I have considered the testimony of the witnesses herein and the evidence placed before me. I have equally considered the submissions filed by the Learned Advocates for the parties, Mr. Shujaa for the Plaintiffs and Ms Mwanja for the Defendant.

18. The circumstances surrounding the dispute herein are rather interesting. From the evidence placed before me, Plot No. 69 Muyeye was allocated to the 2<sup>nd</sup> Plaintiff vide a letter from the District Officer, Malindi Sub-District dated 7<sup>th</sup> July 1989. At the time, the 2<sup>nd</sup> Plaintiff was apparently a member of a group of Squatters resident at Plot No 424 Maweni from which they were being moved. The said letter thus gave the 2<sup>nd</sup> Plaintiff upto 31<sup>st</sup> August 1989 to relocate to the new Plot of land.

19. Subsequently in the year 2007, the 2<sup>nd</sup> Plaintiff who is the father to the 1<sup>st</sup> Plaintiff granted his son permission to construct a residential house on the land for the 1<sup>st</sup> Plaintiff's sole use and benefit. If the Plaintiffs are to be believed, the permission granted to the 1<sup>st</sup> Plaintiff was only limited to the construction of the house and did not extend to the ownership of the land upon which the building was to be constructed.

20. As it were, the 1<sup>st</sup> Plaintiff proceeded to construct a building consisting of ten single rooms for rental purposes on the parcel of land. Shortly thereafter, the 1<sup>st</sup> Plaintiff needed some money and he approached the Defendant herein for the same. It is evident that the Defendant agreed to lend the 1<sup>st</sup> Plaintiff money but subject to certain conditions. Thus is by an Agreement executed by both parties on 12<sup>th</sup> June 2012

before M-M Kupalia Advocates, the parties put down their intentions in writing. The said Agreement though not drawn with legal precision reads in the relevant portion as follows:-

***“Whereas Zakayo Kaiya Kaibunga has advanced Musa Salim Chai a friendly loan of the sum of Kshs 252,000/= on mutual condition that he shall immediately surrender his residential house situate on Plot No. 69(Original No. 412) Muyeye Water Project Malindi as security against (sic) the aforesaid loan of which upon failure to repay the aforesaid loan(sic) within thirty days from the date of execution hereof failure to pay the said loan by the said date both parties have agreed that the said house as security against the loan shall be sold to pay the lender(creditor) with no interest.”***

21. While the 1<sup>st</sup> Plaintiff does not deny being in breach of this Agreement, it is their case that the Agreement did not provide for the Defendant to take over the house. Instead, according to them it advocated for the sale of the house in order to pay the Defendant from the proceeds of the sale. It is not clear to me how the 1<sup>st</sup> Plaintiff intended to go about this given the Plaintiffs contention herein that the land on which the house stood belonged to the 2<sup>nd</sup> Plaintiff.

22. From my observations during the trial, it was evident to me that the 1<sup>st</sup> Plaintiff was either a fraudulent person engaged in conduct that is analogous to the fabled “hekaya za Abunuwasi” or one who was extremely reckless with property which he knew to be in his father’s name. That must be the reason he handed over the Letter of Allotment for the Plot No. 69 which was in his father’s name to the Defendant when they signed the Agreement. That must explain why he gave two cheques to the Defendant in purported payment when, as the documents that the Defendant produced would show, his account at Standard Chartered Bank Malindi had “insufficient funds”.

23. Be that as it may, the Defendant was in my view equally to blame for failing to carry out due diligence on the property he was accepting as security. The documents, especially the Letter of Allotment(PEXh 1), that was handed to him by the 1<sup>st</sup> Plaintiff were clearly in the name of the 2<sup>nd</sup> Plaintiff. In his testimony before this Court, the Defendant admitted that he was aware that the 2<sup>nd</sup> Plaintiff was the 1<sup>st</sup> Plaintiff’s father. Despite such knowledge and the fact that he knew the 2<sup>nd</sup> Plaintiff was alive, he did not take any steps either to enjoin him in the Agreement or to seek his concurrence on the Agreement they were entering with the 1<sup>st</sup> Plaintiff.

24. According to the Plaintiffs, the Defendant collects a sum of Kshs 25,000/= every month from tenants residing in the 1<sup>st</sup> Plaintiff’s house. In support of that contention they produced certain receipts bearing the logo of Nairobi Homes (Mombasa) Ltd. I was not however shown any nexus between the Defendant and the said Nairobi Homes Ltd. Indeed, nothing was placed before me to show that the Defendant has since in the intervening period been collecting any rent from the premises to warrant an award of mesne profits.

25. On the other hand, it is not denied that the 1<sup>st</sup> Plaintiff still owes the Plaintiff the sum of Kshs 252,000/= that was lent to him. That money was lent to him on the security of the house whose vacant possession the Plaintiffs now pray for. While it may not have been right for the Defendant to transfer the property to himself as he purported to do, I think it would be unfair to grant the Orders sought herein when it is admitted that the Plaintiffs are yet to pay the amount that was lent or to sell the house to use the proceeds for payment as was agreed.

26. As Ochieng J. stated in *Mugambi –vs- Housing Finance Company Ltd(2006)eKLR:-*

***“A Plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive an advantage from his own wrong, for the Plaintiff seeks this Court to protect him from the consequences of his own default. He who seeks equity must do equity. The Plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the Defendant/Respondent, a debt which he expressly undertook to pay.”***

27. For the foregoing reasons, I find no merit in the Plaintiffs case. The same is dismissed with costs.

28. Arising from the foregoing, I did not find merit in the Plaintiffs application dated 10<sup>th</sup> May 2017. The same is dismissed with costs to the Defendants/Respondents.

**Dated, signed and delivered at Malindi this 21<sup>st</sup> day of September, 2018.**

**J.O. OLOLA**

**JUDGE**