



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL APPEAL NO. 36 OF 2014

SAUDA MWENYE NURU.....APPELLANT

VERSUS

SUO ALI FAMAU.....RESPONDENT

(Being an Appeal from the Judgment of Lamu Principal Magistrate's

Court in Civil Case No. 15 of 2011 delivered on

12th March, 2015 by Hon. J.M. Munguti - (Ag. SPM))

JUDGMENT

1. The Appellant is seeking to set aside the Judgment of the learned Magistrate, Hon. J.M. Munguti, that was delivered on 12th March, 2015.
2. In the said Judgment, the learned Magistrate held that the Respondent herein had the right over Plot No. 1/1118 (*the suit property*) “*as long as he meets his obligations to the trustees in charge of the trust.*” The Appellant was given 60 days to demolish the structures on the suit land.
3. In his Memorandum of Appeal, the Appellant has raised seven (7) grounds of Appeal which I will summarize as follows: that the learned Magistrate erred in holding that the Respondent had proved his case on a balance of probabilities having failed to produce any document as proof of acquisition of an interest in the suit property; that the Magistrate relied on the evidence of PW3 who was the registered owner or trustee of the land and that the Magistrate erred in finding that the land is a trust property.
4. The Appeal proceeded by way of written submissions.
5. The Appellant's advocate submitted that the Respondent did not produce any evidence any document of title to the suit land; that there was no evidence to show that the land belonged to the grandmother of Fateh Ismael or that a Wakf Deed showing that indeed Fateh Ismael was the trustee and that there was no evidence of the signing of a Lease between the Respondent and the alleged trustee.
6. Counsel submitted that the brother of Fateh Ali never took out Letters of Administration and therefore his evidence was inadmissible.
7. The Appellant's counsel submitted that had the trial magistrate analyzed the exhibits, he would have realized that the Plaintiff's receipt dated 31st April, 1998 does not refer to any particular land; that the receipt of 31st December, 2004 does not refer to the suit property; that the receipt dated 11th February,

2011 for approval of plan refer to a different plot and that the letter of 23rd June, 2011 confirmed that the Appellant was the owner of the land she had developed.

8. The Respondent's counsel submitted that the Respondent's case in the lower court related to the concept of "*House without land*," that the transaction was neither a sale nor a Lease and that the property is a Wakf.

9. Counsel submitted that the last known Trustee of the Wakf, Fateh Ismael died and that the defacto Trustee was the brother of Fateh Ali, PW3.

10. The Respondent's counsel submitted that although the Appellant purported to have bought the land from one Shekue Kibwana, there is no evidence showing the nexus between the said Kibwana and the trust property.

11. Counsel submitted that the Respondent discharged his burden of proof to the lower court by adducing evidence to show how he acquired the suit land.

12. So what was the evidence that was before the trial court?

13. In the Complaint that was filed in the lower court, the Respondent herein averred that he was the lawful owner of land known as Plot 111/8 Block 1 situated in Lamu; that he acquired the land in the year 2004 from one Sheeber Ali and that he had the building plan drawn and approved by relevant authorities in the year 2009.

14. In the Complaint, the Respondent averred that he has preparing to develop the suit property for occupation but when he visited the land in the year 2011, he found the Appellant had invaded it and put up a building without his approval.

15. The Respondent sought for the demolition of the building that had been put up on the suit land by the Appellant.

16. In his Defence, the Appellant pleaded that he purchased the suit land from one Kibwana Shekue for Kshs 40,000 in the year 2004; that Kibwana Shekue had purchased the land from the original owner Tima Athman Lali who had inherited it from her father.

17. The Respondent, PW1, informed the trial court that the land was leased to him by the late Fateh Ismael; that Fateh Ismael was a trustee of the Wakf of his grandmother and that he leased the land to build a house.

18. PW1 informed the trial court that he has not build the intended house because the Appellant has invaded it and that he complained to the Lamu County Council about the said trespass.

19. PW1 stated that currently the land does not have a trustee and that there is no one to receive rent.

20. Other than receipts, the Respondent informed the trial court that he did not have any lease agreement; that the Appellant was a relative of Chief Adnan and that the two had colluded to steal the land.

21. A resident of Lamu, PW2, stated that he heard Fate Lali Ismail say that he had rented the plot to the Respondent for Kshs. 600; that Fate Lali was his employer and that the said amount was paid in his presence.

22. According to PW2, he also owns a plot which.... part of the trust and that they usually pay rent to Shahbal Ali, a brother of Fate Lali.

23. PW3 informed the court that he is a brother of the late Fateh Ishmael Yusuf; that after the death of his brother, he took over the duties of looking after the property of their "*ancestors*" and that his brother was

the trustee of Gulam Hussein Budhabhai Trust.

24. According to PW3, his brother told him that he had given the Plaintiff (*Respondent*) the suit land at a rent of Kshs. 600 per year and that he witnessed the Respondent pay to the late brother Kshs. 500 being the grand rent.

25. The evidence of PW3 was that after the death of his brother, Amina and Adnan, who are the Chiefs in Langoni claimed the plot through a Mr. Dere; that under Islamic law, a Wakf cannot be sold and that in the absence of a descendant, a Wakf usually goes to the mosque.

26. On the other hand, the Appellant, DW1, informed the court that she bought the land from Kibwana Shekue; that she demolished a mud structure which was on the land and that Mr. Kibwana had acquired the land from Tima Athman Lali.

27. It was the evidence of DW1 that all the land in the locality belongs to one Murtaza Kurban and that they pay the grand rent to Chief Amin, who is the agent for Kurban.

28. According to the Appellant, Murtaza showed her Title Deed for the land in the year 2009.

29. The headman of Gardani Estate, DW2, was that the Appellant bought the suit land from Shekue on 19th May, 2004; that he was one of the witnesses and that he saw the Appellant give to Shekue Kibwana.

30. The Appellant's claim is that she bought the suit property from Kibwana Shekue for a consideration while the Respondent's case is that he was allowed on the suit property by the trustee of Wakf, one Sheeber Ali.

31. Although in his Complaint, the Respondent pleaded that "*he acquired the plot way back in the year 2004 from one Sheeber Ali*", when he testified, he informed the court the land was leased to him by Fateh Ismael who was a trustee of the Wakf of his grandmother.

32. It is not clear whether Sheeber Ali is the same person as Fateh Ali Ishmael Yussuf.

33. According to the evidence of the brother of Fateh Ali Ismael Yusuf, PW3, he took over the administration of the property of their "*ancestors*" after the death of his brother, and that before his brother died, he had witnessed the leasing of the land to the Respondent

34. Neither the Respondent nor PW3 produced in evidence any document to show that the suit property was a Wakf or that indeed the late Fateh Ali was a trustee of the said Wakf.

35. Indeed, the only documents that the Respondent produced in court to prove that there is the one entitled to the suit land are receipts in respect to the approval of a building plan that had been submitted to the Lamu County Council, together with a copy of the Plan that was duly approved.

36. Having alleged that he acquired the land from Sheeber Ali or Fateh Ali, the burden of proving that indeed the suit land belonged to the said Fateh Ali or his late grandmother lay with the Plaintiff. The Respondent failed to discharge that burden and was not entitled to the orders he sought in the Complaint.

37. The trial seems to have arrived at a conclusion that the Plaintiff had proved his case by relying on the evidence of PW3 alone. According to the trial magistrate, "*PW3 had clarified that at least his family is aware of the Lease to the Plaintiff by the trustee.*"

38. However, as I have stated above, neither PW1 nor PW3 produced evidence to show that the family of Fateh Ali Ismael ever owned the land.

39. Considering that there was no counter-claim, the Appellant was not under any obligation to prove that he was the one who was entitled to the suit until the Plaintiff discharges his burden.

40. From the evidence that was produced before the court, non of the parties showed his proprietary rights in respect to the suit property on a balance of probabilities.

41. However, in view of what I have stated above the trial court, guided by the provisions of Section 107 of the Evidence Act should have dismissed the suit.

42. For those reasons, I allow the Appeal herein and set aside the Judgment and decree of the trial court and in its place dismiss the Plaint dated 15th June, 2011 with costs.

43. The Respondent shall pay the costs of the Appeal.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE