



REPUBLIC OF KENYA



KENYA LAW
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**Baghrab v Al-Busaidy & 2 others (Appeal 37 of 2022)
[2024] KEELC 1158 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
APPEAL 37 OF 2022
EK MAKORI, J
FEBRUARY 21, 2024**

BETWEEN

SWALEH OMAR BAGHRAB APPELLANT

AND

SEIF MOHAMED SAID NASSOR AL-BUSAIDY 1ST RESPONDENT

HILAL SAID NASSOR AL-BUSAIDY 2ND RESPONDENT

KHALIFA SAID NASSOR AL-BUSAIDY 3RD RESPONDENT

(Appeal from the judgment and decree of the Chief Magistrates Court by Hon. D. Wasike delivered on 21st September 2022 in Malindi Chief Magistrates ELC No. 11 2019)

JUDGMENT

1. The impugned judgment in CMCC Land Case No. 11 of 2019, shows that the respondents herein commenced proceedings against the appellant in the Lower Court claiming that they were the owners of Plot No. 4089/55 Malindi (original 1755/57) which was subdivided and there was a resultant portion known as Plot No. 4134 Malindi [the suit property] they sought for inter alia vacant possession of the said portion of land known, and demolition of the appellant's structures standing thereon within seven days of the court's order on grounds that no consent had been obtained from the and the County Government of Kilifi.
2. In the trial Court, the appellant testified that he purchased the house without land on the suit premises from the respondents' predecessors in title, by the time they had assumed ownership, he was already in possession and they had permitted him to continue occupying the land and undertaking further expansion. Apart from the house he had rented out.



3. In the end, the Lower Court agreed with the respondents and issued orders inter alia, a mandatory injunction against the appellant to demolish the said structures. It is this demolition that is the subject of the present appeal.
4. The appellant in the Memorandum of Appeal raised issues that there was an oral agreement for expansion which the trial Magistrate did not consider. The offending structures for demolition were not specified. Failure to exclude shops standing on the premises as part of the offending structures. The trial Court did not appreciate the evidence tendered by the appellant. The Court erred in allowing both the main prayers and the alternative.
5. The appeal was canvassed by way of written submissions.
6. The appellant argued that consent had been given 3 years before the filing of the suit for further development on the suit property as long as it never went beyond the boundaries of the suit property. The burden of proof shifted to the respondent to dispel the appellant's assertion that an oral agreement had been reached to undertake further construction. The case of *Mbuthia Macharia v Annah Mutua Ndwiga and Another* [2017] eKLR, cited in this regard. The appellant further argued that there was no protestation from the respondents when the structures were being erected 3 years after the filing of the suit in the Lower Court. This the appellant contended was untenable quoting the case of *Total Kenya Ltd v D Pasacon General Construction & Electrical Services* [2022] KECA 593 (KLR (8th July) (Judgment)).
7. The appellants fault the trial Court by failing to reckon that the shops behind the house had no issues and should not have been subject to demolition. This is a contradictory finding, where one part of the judgment makes a finding that there was consent and the other finds otherwise lending credence that consent had been granted after all.
8. The appellant submitted that the grant of other prayers in the alternative offended the law. The case of *Olive Mwhaki Mugenda & Another v Okiya Omtata Okoiti & Others* [2016] eKLR.
9. The respondents on the other hand are of the view that the appeal lacks merit and should be dismissed with costs. The respondents argued that they are the beneficial owners of Plot No. 4089/55 Malindi (original 1755/57) which was subdivided and there was a resultant portion known as Plot No. 4134 Malindi [the suit property] occupied by the appellant as a tenant. The land had been purchased from one Rashid Bin Azzan Bin Rashid El-Sakry at consideration and transferred to the respondents on the 3rd of September 1999. The appellant started a major construction on the suit premises without consent hence the suit in the Lower Court. The respondents cited the case of *Murtahar Ahmed Dahman & Another v Athuman Sudi* [2013] eKLR, enunciating that consent to do any development in a house held without land is key. This position seems to change as can be seen in the case of *Alwi Mohammed Alwi v Swaleh Omar Awadh* [2019] eKLR.
10. The respondents further stated that by the fact that they are the registered owners of the entire property. And that the appellant is a tenant on the suit premises having been granted leave to enter the suit premises and occupy the existing premises which he purchased (without land), no major renovations could be carried out without the Landlords' permission in this case the respondents. No evidence was led to prove that such permission was obtained. No documentary evidence and testimony were tendered about the consent when the matter proceeded at the trial Court. There was a contradiction that consent was granted by the 1st respondent when in cross-examination he alluded that it was all the respondents who had given the consent.



11. The respondents asserted that on the contrary, it was him to prove the consent. The burden was not on the respondents and thus the authority in *Mbuthia Macharia v Annah Mutua Ndwigwa and Another* [2017] eKLR, cited in this regard by the appellant concerning the application of Section 107 of the *Evidence Act* was not applicable in this case.
12. The respondents support the judgment as rendered by the trial Court stating that the appellant failed to prove his case on the required standard in law. The evidence as tendered by the appellant did not meet the test set by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR on the incidence of the burden of proof, it did not meet the bar to shift the burden to the respondents. In this regard too, the respondents further cited the cases in *Levi Simiyu Macharia v Koyi John Waluke* [2018] eKLR and *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR.
13. The respondents submitted that the appellants failed to shoulder the burden of proof on a balance of probabilities that consent was ever granted to do the expansions subject of the trial in this appeal and the Lower Court. That burden remained static and could not be shifted to the respondents at all. The respondents contrasted this case with that of *Total Kenya Ltd v D Pasacon General Construction & Electrical Services* [2022] KECA 593 (KLR (8th July) (Judgment), where there was no objection to the additional work done. There was job completion work executed by both parties.
14. The respondents avowed that since they are the registered owners of the entire suit property any major alterations could infringe on their proprietary rights which cannot be compensated by an award of damages.
15. On the issue of acquiescence on the works done the respondents argued that that did not take away the fact that no consent had been granted for the works undertaken the appellant trespassed on the respondents' property by making an unauthorized extension and he ought to be treated as such. The respondents cited Section 3(1) of the *Trespass Act* and the decision in *Felthouse v Bindley* [1862] EWHC CPJ35, that silence did not amount to acceptance of an offer. No evidence was led to show the respondents accepted the appellant's overture in the extension works undertaken.
16. The respondents further contended that the acts by the appellant violated the proprietorship rights of the respondents as enacted in Sections 24, 25, and 26 of the *Land Registration Act*. No permission was granted to the appellant from either the respondents or the local authority to undertake such extensions.
17. The respondents averred that the appellant was obligated to pull down the structures without compensation for having trespassed and that the appellant did not lay a compensation claim citing the Indian case of *Poramanick's case* [1866]6 W.R. 228 quoted in *Said Bin Seif v Sharriff Mohammed Santry* KLR Vol.-XIX Part 1 1940 at Pg. 17.
18. The respondents finally averred that prayer 5 was an alternative to prayer 4 which was not awarded hence the magistrate was right in granting the same.
19. The role of the first appellate Court has been aptly summarized by Mativo J. in *Mursal & Another v Manese* (Suing as the Legal Administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) as follows:

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. This duty was stated in *Selle*



& another v Associated Motor Boat Co. Ltd. & others and in Peters v Sunday Post Limited. [1968]EA 123. [1958] E.A. page 424.

3. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. See Santosh Hazari v Purushottam Tiwari (Deceased) by L. Rs [2001] 3 SCC 179.
 4. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal, parties have the right to be heard on both questions of law as also on facts, and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of the *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
20. The issues raised in this appeal from the Memorandum of Appeal the materials placed before me and the submissions by the parties are significantly revolving around whether the appellant had consent to undertake the expansion on the house (without land) that he had been permitted to stay by the respondents.
 21. Corollary to the foregoing whether the offending structures for demolition were not specified in the judgment by the trial Court by failure to exclude shops standing on the premises as part of the offending structures. Whether the trial Court did not appreciate the evidence tendered by the appellant on the evidential and burden of proof. And whether the Court erred in allowing both the main prayers and the alternative. Who should bear the costs of the appeal?
 22. From the record of appeal each party in the Lower Court called one witness who adopted their witness statements and were cross-examined.
 23. The evidence by the 1st plaintiff (now 1st respondents) as tendered by one Mr. Sief Mohamed was that the defendant (now appellant) was a tenant on Plot No. 4049/55 and was paying a rent of Kshs 300 per month. The property was later to be purchased from the initial owner in 1999. Sub-division had been done in the year 1988 on the original property. The defendant was allowed to purchase a house without land on the suit property on a rent basis. Without permission from the plaintiffs or the County Government, the defendant embarked on constructing further accommodation on the suit premises in breach of the terms that permitted his stay and entry.
 24. Mr. Swaleh Omar testified that he had entered the suit premises on a lease in 1980 way before subdivision. When the respondents entered they agreed to continue with the terms of the lease. He applied to the County Government for a permit to extend his house which was allowed in the year 2015 and he started construction way back in the same year. The plaintiffs had also consented that



he undertake the constructions. He did 7 shops behind his house 3 years before the present suit was initiated with the approval of the County Government.

25. The trial Court analyzed the concept of a house without land citing the decisions in *Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 Other* [2018] eKLR and *Christopher Baya and 2 Others v Philip Kiluko and Another Msa HC Civil Appeal No. 64 of 2004* and arrived at the following conclusion:

“I find that the defendant can only do that which the lease permits him to do which is he has a right to build on the land under agreement but only with the permission of the owner of the land. Without any such agreement or consent, then he should retain the property in the position he found it to be.

In this case, the plaintiffs being the owners of the property contend that they never gave the defendant consent to further build on the land. If, however, he has gone ahead to build and such permission is not given or is withdrawn, then as held in the said case, the defendant has no choice but to remove the house that has been constructed.

It is unfortunate that despite the defendant having lived on the land from 1980, the plaintiffs seem not willing to allow him to make any alterations or further constructions on the land. This he is bound as he cannot proceed without any consent. He has no choice but to remove the offending structures or risk his lease terminated.

The plaintiffs have not raised the issue of the shops constructed at the back but only the ongoing- construction to the house.”

26. We are dealing with a phenomenon called house without land which defies the ownership of land as it is conventionally known. It has been addressed by the Bench of the Court of Appeal Judges sitting in Malindi (this is a common phenomenon here in the Coast region - see for example the case of *Abdukarazak Khalifa Salimu v Harun Rashid Khator & 2 Others* [2018] eKLR, which the trial Court relied on:

“Yet again the concept of house “Without Land” is back before this court. In Coastal Kenya a land tenure known as house without land is common. This is where a person can own a house without owning the land upon which the house stands. In *Famau Mwenye & 19 others v Mariam Binti Said, Malindi HCC No. 34 of 2005 (Ouko J.)* - as he then was, described the concept of a house without land as follows:

“The dispute arises from land tenure unique... to Mombasa which has baffled scholars, practitioners, and even jurists. That land system is only referred to as “House without Land” that is the owner of the house is different from the owner of the land on which it stands. It therefore defies the common land concept of land expressed in the Latin Maxim (*cujus est solum ejus usque ad coelum*) meaning - is the soil, his is also that which is above it).”

27. As time passes, the owner of a house without land continues to face hardships. It would appear that a person who owned such a house had far more rights in the past under the repealed Land Titles Act than he does now that Article 260 of *the Constitution* defines what land comprises:

“land” includes— (a) the surface of the earth and the subsurface rock;

(b) any body of water on or under the surface;

(c) marine waters in the territorial sea and exclusive economic zone;



- (d) natural resources completely contained on or under the surface; and
- (e) the air space above the surface; "

28. That definition ousts the concept of a house without land and therefore the system stands untenable in recent times.
29. This brings me to the central question of this appeal: did the respondents give the appellant permission to carry out the construction projects he had undertaken? He claimed to have been given oral consent when testifying at the Lower Court. according to the responders they never gave him consent. The applicant cited his commencement of the developments in 2015 as support.
30. He stated that even if he didn't have this kind of permission, the respondents had consented by letting him start construction gradually, so they couldn't claim they never did. In a case such as this, the claims that the respondent now bears the burden of proof are unfounded. The appellant had the exclusive burden of proving that such consent had ever existed. He who claims must prove. The responders did not do anything to indicate that this kind of consent had been granted.
31. Ideally disposition in land of whatever kind needs to be in writing to dispel the notion that no such dealing existed as in this case. Caution should be taken from the [Law of Contract Act](#) Section 3(3):
No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
32. In this case the respondents denied before the trial Court ever granting permission to the appellant to undertake the construction of the offending structures and extensions. The trial Court could not infer the same from their conduct of letting him construct over time and questioning later. I do not therefore fault the trial magistrate in concluding that there was no such consent, since none was produced. In any event, as I have said – it had to be in writing.
33. The magistrate acted appropriately, adhering to previous precedents that in the absence of permission, the only course of action available was to order the demolition of the illegally constructed buildings.
34. As previously mentioned, the idea of a house without land is becoming less and less tenable, and it must be eliminated to prevent difficulties for such owners. In *Alwi Mohamed Alwi v. Swaleh Omar Awadh* [2015] eKLR, for example, where the appellant in this case was the defendant, Angote J. raised the following red flag:

“In my view, it is time, with the promulgation of [the Constitution](#), the [Land Act](#) and the [Land Registration Act](#) which repealed the Land Titles Act, that the concept of a house without land, which has been recognized in the coastal area for decades should be buried and forgotten.

Indeed, the operative land statutes do not recognize this concept of a house without land any longer. The concept of a house without land, although recognised under the repealed Land Titles Act, defies the existing definition of “land” and “lease” in our laws.



I, therefore, do not understand, even with these changes in our laws, why the County Government of Kilifi will still approve the construction of a building by a person who does not have a beneficial or legal interest in a piece of land on which he proposes to put up a house.

My concern with such approvals is this: what will happen in the event the owner of the land demands his land back after a person has invested in constructing a building on the same land? The answer can only be one, the person will lose his investment because land has been defined by *the Constitution* to include the surface of the earth and the subsurface rock. With the repeal of the Land Titles Act, any other definition of “land” will be unconstitutional.

My observations above are just but cautionary to the people intending to put up buildings on land that do not belong to them considering the changes in our land laws.”

35. I conclude that the magistrate did not err in determining that the offending constructions had to be demolished and that the appellant did not have formal consent to commence the extensions he was doing.
36. About the question of which buildings needed to be destroyed. The trial court noted, based on the facts presented, that the respondents had no problems with the shops behind the house, as I can see from the record. The structures that were being targeted as being erected without permission were the subject matter in the Lower Court. Thus, I am unable to look into that matter further.
37. Regarding substitute prayers. I won't contest the magistrate's conclusions because the prayers were drafted in a way that made prayer number 5 an alternate to prayer number 4.
38. Lastly, this appeal is hereby dismissed, and the respondents will be reimbursed for their costs here and in the Lower Court.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 21ST DAY OF FEBRUARY 2024.

E.K. MAKORI

JUDGE

In the presence of:

Mr. Nyongesa for the Appellant

Mr. Kandia for the Respondents

Court Assistant: Happy

