



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL CASE NO. 24 OF 2012

1. MURTAHAR AHMED DAHMAN

2. ALI-AMIN AHMED DAHMAN (suing as administrators of the estate of

MARIAM BINTI SAID.....PLAINTIFFS

=VERSUS=

ATHUMAN SUDI.....RESPONDENT

J U D G M E N T

Background:

1. The Plaintiff moved this court by way of a Plaint dated 24th February 2012 and filed on 27th February, 2012.
2. The matter proceeded ex parte after the Defendant failed to enter appearance and file a defence within the requisite time.
3. The Plaintiff's Plaint is seeking for the following declaratory orders.

(a) A declaration is issued that the termination notice issued and served upon the defendant in September, 2010 terminated the defendant's revocable licence to have a temporary building on a site on portion 522 Malindi and the Plaintiffs are entitled to immediate possession of the land in vacant possession.

(b) The Defendant's continued possession and occupation of the temporary structure on portion 522 Malindi is wrongful and illegal and the defendant is liable to pay to the Plaintiffs Kshs.310,000/- and mesne profit at the rate of

Kshs.2,000 per month from March, 2012 until the defendant vacates the site.

(c) An order of ejectment of the defendant from portion 522 Malindi (by demolition of the structures and restoration of the site on the suit land to its original state at the defendant's expense) is issued.

(e) The defendant is ordered to pay the costs of this suit.

4. The Plaintiff has averred in his plaint that during her lifetime, Mariam Binti Said (deceased) granted the Defendant, through her son Al-Amin Ahmed Dahman, by a verbal agreement a personal revocable licence to build a temporary structure for his residence on a small part of the suit land.
5. In consideration to the said verbal revocable licence, the Defendant agreed to pay ground rent of Kshs.300 per month which was regularly adjusted upwards to Kshs.2,000 per month; that the Defendant fell in arrears of ground rent from 1999 and as of September 2010, he owed the Plaintiff's the sum of Kshs.276,000/-.
6. The Plaintiff finally averred that by way of a notice issued on 25th September 2010, the personal revocable licence was terminated and the Defendant was required to vacate and remove his temporary structure from the suit land which he has not complied with and that the Defendant should give vacant possession of the suit property and pay ground rent and mesne profits amounting to Kshs.310,000/-.

The Plaintiff's' Evidence;

7. The 2nd Plaintiff, Al-Amin Ahmed informed the court that the 1st Plaintiff is his elder brother. The late Mariam Binti Said was their mother and she died on 6th May, 2007. They filed succession cause number 36 of 2007 in which they were granted the letters of administration. The 2nd Plaintiff produced the copy of the certificate death, the original Grant of the letters of administration and the certificate of confirmation as Plaintiff's exhibit 1a, b and c.
8. PW 1 further testified that plot number 522 is around 5 acres and it is still in the name of their late mother Mariam Binti Said. He produced the certified copy of the title and the certificate of postal search as Plaintiff's exhibit 2a and b.
9. According to second Plaintiff, PW 1, Athuman Sudi, the Defendant, asked him to allow him to construct a temporary structure on their land on condition that he will be paying ground rent on a monthly basis. He allowed him on 13th June, 1991 to construct a house on part of their land. At the beginning, the Defendant used to pay Kshs.300 every month and the rent kept on rising.
10. PW 1 testified that the Defendant paid the rent until March 1999 when he stopped paying until now. He issued a termination notice to the Defendant through his advocate in the year 2010.
11. Before the notice was issued, the Defendant owned the Plaintiffs kshs. 86,300 and by the time the suit was filed he was owing the Plaintiffs Kshs. 310,000. According to the 2nd Plaintiff, the Defendant has not removed the structure he constructed on the land. In fact, it was stated, the Defendant has started constructing another permanent house on the land.
12. The demand notice was produced as Plaintiff's exhibit number 3. PW 2 stated that the defendant was served with the demand notice by the court process server. The Plaintiff stated that they were demanding Kshs.2,000 per month being the ground rent.
13. PW 1 produced in evidence the last receipt which he gave to the Defendant in which he paid Kshs. 30,000 for the period running January 1998 – March 1999 at the rate of Kshs.2,000 per month as Plaintiff exhibit 4. That was the last payment that the Defendant made.
14. Thomas Kalume Konde, PW 2 informed the court that he was working at Kaloleni Law Courts as a process-server. He testified that he was given a termination notice dated 25th September, 2010 by S.M. Kimani Advocates to serve on Athumani Sudi. He served the same on 27th September, 2010 and filed an affidavit of service. The Affidavit of service was produced as Plaintiff exhibit number 6.

15. Joseph Jaura, PW 3 testified that he was an employee of Malindi Municipal Council and his duties included supervision of the construction of buildings.
16. PW 3 informed the court that he served the Defendant with a notice informing him that the structure that he was putting up on the suit property was illegal because there were no approved plans by the council. The witness produced the notice as exhibit 7.

Plaintiff's Submissions

17. Mr. S. M. Kimani, counsel for the Plaintiff filed written submissions together with his authorities on 24th April 2013.
18. The Plaintiff's counsel submitted that this suit was filed by the two Plaintiff's as the administrators of the Estate of Mariam Binti Said and that at all material times, the said Mariam Binti Said was the registered owner of all that parcel of land known as Plot number 522 Malindi measuring approximately 5.68 acres.
19. The Plaintiff's advocate submitted that despite the Defendant being served with a notice to vacate the suit property, the Defendant has refused to either pay ground rent or vacate the site and that his continued occupation and use of the land is wrongful his licence having been determined by the issue of one month's notice. According to counsel, the notice was served on the Defendant pursuant to the provisions of Section 107 and 108 of the Transfer of Property Act, 1882 of India.
20. In conclusion counsel submitted that the notice that was served on the Defendant expired by effluxion of time on 31st October 2010 and that from 1st November 2010, the Defendant was a trespasser on the suit land and the remedy available to the Plaintiff is ejection. The Plaintiff's counsel relied on numerous authorities which I have considered.

The concept of a house without land;

21. 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 its peculiar historical ties unlike the other parts of the country.
22. It is common knowledge that where 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 things embedded for the permanent beneficial enjoyment of that to which it is so attached.
23. 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.
24. 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, however, are supposed to be noted on the certificate of title.
25. 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.
26. The concept of owning a house or coconut trees by a person who is not the owner of the land was and is still being used by absentee landlords to either generate an income for themselves or to forestall the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years.
27. This interesting concept of "Owning a house or coconut trees without land" as recognised 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.
28. 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.***
29. 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.

Analysis

30. The Defendant has not disputed the fact that he was allowed on the suit premises by the Plaintiff's mother, now deceased and that the suit property has always been registered in the name of Mariam Binti Said.
31. The Defendant has also not disputed the averments and testimony by the Plaintiffs that during the Plaintiffs' mother's lifetime, the deceased allowed him to enter upon the suit property and erected a temporary residential structure in consideration of payment of a monthly ground rent, which varied in amount over the year, and that the said temporary structure was erected "without land," a phenomenon recognised in the coastal region.
32. PW1 produced in evidence the certificate of death with a burial permit in respect of the late Mariam Bint Said and the certificate of confirmation of a grant as Plaintiff's exhibit 1a, b and c.
33. PW1 also produced in evidence the Certificate of Title issued under the Land Title Ordinance, 1908 and the Certificate of Postal Search as at 22nd February 2012 which shows that the registered owner of the suit property is the late Mariam Binti Said.
34. The termination notice dated 25th September 2010 entitled "Termination of Site Rights and Notice of Removal of "House without Land" on part of plot number 522, Malindi was produced as Plaintiff's exhibit 3.
35. The uncontroverted evidence before me is that the Defendant has now constructed a permanent structure on the suit property without the owner's consent and without the authority of the Municipal Council.
36. 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 on yearly rent is reserved, can only be made by a registered instrument.
37. The site acquired by the Defendant for the development of his house from the Plaintiff under an oral agreement is not under a registered instrument.
38. It is therefore true, as submitted by the Plaintiffs' counsel, that where a party enters upon the land of another, and erects a building with the permission of the land owner, such leave, 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 in before entry.
39. In **Arif Vs Jadunath Majdma (1930) Vol VIII Indian Appeals, 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 an order of ejectment after a month's notice and the lessee is obliged to remove his structure and restore the land to its original state".

40. Lucie Smith J, in **Said Bin Seif vs Shariff Mohamed Sharty (1940-1) Part II, Vol XIX, KLR 9** 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".

41. PW1 testified and stated that he does not desire to retain the house constructed by the Defendant on their land. Consequently, and in view of the provisions of section 108 of the Transfer of Property Act, 1882 of India, the issue of compensation does not arise. In any event, the Defendant has not claimed for compensation of the permanent structure on the suit property.

42. The Defendant was served with a termination notice. He has neither removed the house on the suit property nor paid the ground rent. PW1 testified that the Defendant stopped paying rent in 1999. Before the termination notice was issued in 2010, the Defendant was owing ground rent of Kshs.86,300/-. The amount accumulated to Kshs.310,000/- by the time the Plaintiff was filed. The witness produced copy of a receipt as Plaintiff exhibit 4 which showed the payment by the Defendant for the ground rent between January 1998 to March 1999. This payment by the Defendant confirms that he was paying ground rent of Kshs.2,000 per month for the site that he had been allowed to occupy and erect a house.
43. I am satisfied on the evidence placed before me that the Defendant has continued to wrongfully occupy and use the site where he has erected his house. The Plaintiffs are entitled to mesne profit for the period that the Defendant has continued to trespass and wrongfully use the property.
44. In the case of **Inverugie Investment Ltd vs Hackett (1995)3 All ER 841**, the Privy Council held as follows:

“A person who let out goods on hire on the landlord of residential property was entitled to recover damages irrespective of whether or not he could show that he would have let the property to anybody else and whether or not he would have used the property himself.”

45. Applying the above principles and considering the evidence on record which shows that the Defendant paid ground rent up to March 1999, I find and hold that the Plaintiffs have proved that from March 1999 to September 2010 when the notice of termination of licence was issued, the Defendant owed the Plaintiffs Kshs.276,000. I further find and hold that the Plaintiffs have proved that the mesne profit for the period between October 2010 to February 2012 when this suit was filed was Kshs.34,000 and the said mesne profit is payable at the rate of Kshs.2,000 per month from the date of filing of this suit until payment in full.
46. For the reasons I have given above, I allow the Plaintiffs' claim in the following terms;

(a) A declaration be and is hereby issued that the termination notice issued and served upon the Defendant in September, 2010 terminated the defendant's revocable licence to have a temporary building on a site on portion 522 Malindi and the Plaintiffs are entitled to immediate possession of the land in vacant possession.

(b) The Defendant's continued possession and occupation of the temporary structure on portion 522 Malindi is wrongful and illegal and the defendant is liable to pay to the Plaintiffs Kshs.310,000/- and mesne profit at the rate of Kshs.2,000 per month from March, 2012 until the defendant vacates the site.

(c) An order of ejection of the Defendant from portion 522 Malindi (by demolition of the structures and restoration of the site on the suit land to its original state at the defendant's expense) be and is hereby issued.

(e) The Defendant is ordered to pay the costs of this suit.

Dated and Delivered in Malindi this 12th day of July, 2013.

O. A. Angote

Judge

