



REPUBLIC OF KENYA



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**Omar v Adarus & another (Civil Appeal E004 of 2021)
[2023] KECA 705 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 705 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E004 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JUNE 9, 2023**

BETWEEN

KHALTHUM ABDULLA OMAR APPELLANT

AND

MUNAA HUSSEIN ADARUS 1ST RESPONDENT

SHIFAA HUSSEIN ADARUS 2ND RESPONDENT

(An Appeal from the judgment and decree of the Environment and Land Court at Mombasa (Omolo J.) delivered on 21st September 2020 in Mombasa ELC Case No. 304 of 2020)

JUDGMENT

1. The dispute the subject of this appeal has its origin in the plaint dated September 2, 2010 as amended on November 20, 2014 filed in the High Court at Mombasa by the Respondents herein against the Appellant. According to the said plaint, the Respondents were the registered owners together with Asma Hussein and the Late Shihabdin Hussein Adarus of the leasehold interest of the parcel of land No Mombasa/Block XXXII/4 for a period of 99 years from November 1, 1984 from the Government of Kenya as tenants in common. It was their case that they inherited from their late father residential flats on the said parcel of land which were sub-leased to all the Lessors, with the Respondents subleasing Flats No 3 and 4.
2. It was pleaded that the Appellant was the purchaser of Flat No 2 in the said building having purchased the same in 1999 from the Late Shihabdin Hussein Adarus subject to the terms and conditions of the sub-lease to the said Shihabdin Hussein Adarus. However, in breach of the terms and conditions of the said sub-lease, and without the consent of the Respondents and other occupiers of the said flats, the Appellant, in August, 2010, started to construct on the open space used by all the occupants of all the flats together with their children and guests. It was, further, the Respondents' case that the construction was illegal as the approval in respect thereof was based on a forged letter. According to the



- Respondents the said construction was bound to interfere with the enjoyment and quiet possession of the Respondents' flats including their right to air and uninterrupted view of the sea, playground for children, access to the water tank and other users.
3. The Respondents therefore sought an order for permanent injunction restraining the Appellant from continuing with the said construction or interfering with their enjoyment and quiet possession of their flats on the said land; demolition of any structures illegally erected therein; general damages for illegal occupation and construction on the suit land; exemplary damages for proceeding with the illegal construction against the orders of the court; costs of the suit and interest thereon.
 4. In her defence dated November 1, 2010 and amended on December 19, 2014, the Appellant averred that the suit property is a leasehold interest registered in the names of Asma Hussein, Shihabdin Hussein Adarus, Munaa Hussein Adarus, Shifaa Hussein Adarus and Aidarus Hussein Adarus and that she was to take the share of Shihabdin Hussein Adarus but the Respondents refused to acknowledge her title. The Defendant denied the allegations made against her particularly that the construction was on an open space. She pleaded that the construction was done with the consent/approval of Aidarus Hussein Adarus, a co-owner, a brother and agent of the Respondents who are ordinarily resident in the United Kingdom and a Co-administrator of the Estate of Hussein Adarus, the original owner of the property. The Appellant averred that the approvals for the construction were legally sought and were not based on forgery and disclosed that the criminal complaint by the Respondents was dismissed.
 5. According to the Appellant, the construction would enhance the value of all the four flats on the property and not only the first and ground floor flats. She therefore denied that the construction would interfere with the Respondents' quiet possession of the flats and prayed that the suit be dismissed with costs.
 6. The Respondents' case, as narrated by the PW1, Qassim Abu Mado, the donee of the Power of Attorney donated to him by the Respondents and the husband of the 2nd Respondent and brother in law to the 1st Respondent, was that Flats 3 and 4 belonged to the Respondents and Asma Hussein Adarus. Though clause 8 of the Appellant's sub-lease clearly spelt out the demarcated boundaries, the Appellant went outside the boundary of each flat and commenced construction thereon without informing the Respondents of her intention to do so, which was contrary to paragraph 4(c) of the sub-lease made between the 4 owners of the flats and Shihabdin Hussein Adarus. The said construction, he stated, was based on an alleged approval letter dated April 21, 2020 purportedly issued by the Municipal Council of Mombasa but which, upon examination was found by the Kenya Anti-Corruption Commission to be a forgery. Based on the said finding, the Municipal Council of Mombasa issued a notice to demolish which was disregarded by the Appellant who continued with the said construction to completion. According to the witness, the construction affected the entire plot's access to the sea as well as to the water tanks. In support of the Respondents' case, PW1 produced various documents as well as photographs taken when the construction was ongoing.
 7. In PW1's evidence, Aidarus Hussein Adarus had no authority to give consent as each of the beneficiaries owned the flats with Aidarus owning the flat on the ground floor. While acknowledging that the Appellant was acquitted of the charge of forgery, he disclosed that the decision was appealed against. He however admitted that the transfer of flat no. 2 to the Appellant was legally sound but that what was sold was the lease of the flat only.
 8. PW2, Chrisantus Mwadime, an officer with the County Government of Mombasa in the Department of Lands, Planning and Housing who, in 2010 was a Planning Assistant with the former Municipal Council of Mombasa in the same department, confirmed that the signature that appeared in the



documents that granted the Appellant permission to construct an approved development item was not his. It was his evidence that he had never seen the approval prior to being approached by an officer from KACC in 2011 to confirm whether the said signature was his. According to him, any development done using the said approval letter was improper. It was his evidence that he was the one authorised to sign such documents after the retirement of his boss in 2006.

9. On behalf of the Appellant, Ali Mbarak Ali, the Appellant's husband and a donee of Power of Attorney from the Appellant confirmed that the Respondents owned flats above the one owned by the Appellant whose flat was on the first floor. According to him, the Appellant purchased her flat from the Respondents' brother, Shihabdin Hussein Aidarus, who was also the Appellant's uncle, on December 11, 1999. According to him, the building was initially owned by the father of the four flat owners and upon his death the grant was issued to the Respondents' brother, Aidarus, and their deceased sister and the building was shared out in accordance with the Islamic Law.
10. In 2010 when the witness wanted to renovate their plot, he wrote to the said Aidarus seeking consent which was granted and afterwards, they obtained approval from the Municipal Council, a letter from NEMA and an approval from Mombasa Old Town Conservation Office. According to him the renovation was intended to extend their flat to cover the open front area. In his view the construction was legal, all the requisite consents having been obtained.
11. According to the witness, they bought flat no 2 and the unexpired lease and obtained a certificate of lease. However, the head lessor was Asman Hussein and three others whose consent, it was his view, he did not require. He admitted that whereas the Grant was held by Aidarus and his sister, the letter dated March 12, 2010 requesting for consent was addressed to three people and asserted that it was not only Aidarus who gave consent. While conceding that the Appellant was charged, he maintained that she was acquitted. It was his evidence that the construction was not completed having been stopped by the Court and he denied blocking the ground floor. In his evidence, the pillar on the ground floor were to support his extension and asserted that there was a door allowing access downstairs.
12. At the end of the hearing the Court conducted a site visit and found that there was a slab protruding on the first floor; that the slab was supported by the pillars constructed from the ground floor; that there was a house built below the slab that was occupied; and that access to the back of the building was blocked by the additional house on the ground floor.
13. In her judgement, the Learned Trial Judge found that from the agreement for sale dated December 11, 1999, what was sold was the unexpired leasehold interest in Flat No 2 and that there was no mention of the Appellant being a co-owner as alleged. She referred to the property section of Certificate of Lease given on October 25, 2001 issued to the Appellant where the Respondents were referred to as sub-lessors while the Appellant was referred to as sub-lessee an indication that the Appellant and the Respondents did not have equal rights in respect of the suit property. Referring to clause 4(c) of the sublease that required that the consent of the Lessors before any structural alterations or additions were made, the Court referred to the statement by the Appellant that he sought consent vide letter dated March 12, 2010 from the sub-lessors but was unable to deliver the Respondents' copy because he did not know their address. The Learned Judge found that though Aidarus Hussein Adarus purported to give the consent on behalf of the Respondents, the Respondents did not sign any written consent and the said Aidarus was not called as a witness and his statement was inadmissible.
14. According to the Court, there was no evidence that the Appellant made attempts to reach the Respondents for the purposes of getting their consent and did not adduce any evidence to show that Aidarus had authority to give consent on behalf of the Respondents as he did. Accordingly, the Court



found that renovations and extensions were done without full authority thus the works were illegally done.

15. In the result the Court granted the prayer for injunction, the order for demolition and costs but declined to award damages in the absence of satisfactory evidence that any was suffered. The Appellant was given four months from the date of the judgement to remove the offending structure and in default the Respondents were at liberty to remove the same at the Appellant's costs.
16. It was this decision that aggrieved the Appellant and provoked this appeal in which five (5) grounds were raised where they fault the learned Judge for: finding that the Appellant did not own equal rights with the Respondents yet the Agreement of sale provided for the sale of both Flat No 2 and the leasehold interest for the unexpired residue of the term of 99 years from November 1, 1984; finding that the Appellant had not sought the consent of the Respondents yet the consent was sought and granted by one of the sub lessors; misconstruing clause 4(c) of the sub lease; coming to the wrong decision on her evaluation of the evidence; and arriving at a finding not supported by the evidence on record. The Appellant sought that the Appeal be allowed, the judgment and decree of the High Court set aside and an order made dismissing the suit with costs to the Appellant.
17. The appeal was argued on the Court's virtual platform on February 8, 2023 during which Learned Counsel Mr Khatib appeared for the Appellant while Mr Kiarie Kariuki appeared for the Respondents. The parties informed us that they had filed their written submissions which they highlighted before us.
18. In this appeal, the Appellant reminded us of our primary duty of re-evaluating the evidence on record with the caution as held in *Selle v Associated Motor Boat Co. [1968] EA 123*.
19. It was submitted that since the Appellant bought the flat No 2 from one of the co-owners and took over all the rights, she therefore, became a co-owner for that property since the seller had no more rights. According to the Appellant, the Learned Judge misconstrued the word 'you' in letter dated March 4, 2010 as referring to its use in singular when the Appellant used the word in plural form hence arrived at a wrong conclusion.
20. It was submitted that since the Appellant applied for and obtained the approval which was lawfully obtained as the prosecution against her for forgery claim was dismissed, and since she was the holder of a leasehold interest she, under the provision of Section 105 of the Transfer of property Act had the right to develop her property, provided that there was no interference with other users. In this respect the Appellant referred to *Famau Mvvenye & Others v Mariam Binti Saidas* quoted in *Shaban Juma v Mwaiuma Juma (2013) eKLR*.
21. It was submitted that even if the Appellant had purchased Flat No 2 only, without the title rights, the agreement still amounts to a lease. In the Appellant's submission, she had proved that she lawfully purchased Flat No 2 and obtained rights over it and was exercising her rights by extending the flat which is simply improving the premises; the consent pursuant to the clause 4 of the Agreement was lawfully obtained; the approved plan from the Municipal Council of Mombasa was lawfully obtained; and the construction undertaken by the Appellant did not in any way interfere with the usage of the 1st, 3rd and 4th flats. It was therefore submitted that the trial Court erred in law and fact in finding that the Respondents proved their case against the Appellant. We were urged to allow the Appeal as prayed with costs to the Appellant.
22. On behalf of the Respondents it was submitted that from the evidence adduced, the consent of the Respondents was necessary yet the same was not obtained since Aidarus Hussein neither had the authority of the Respondents nor was he mandated to represent the Respondents. It was therefore submitted that the Appellant was in breach of the terms and conditions of the sub-lease under which



the Appellant purchased the subject Flat No 2 by constructing on the open space which was for use by the occupants of all the flats together with their children and guests. By not obtaining the consents of the Respondents, it was submitted that the Respondents were in breach of paragraph 4(c) of the sublease.

23. It was therefore submitted that the findings by the Learned Trial Judge could not be faulted as she properly evaluated the evidence before her in arriving at the judgement.
24. We were urged to dismiss the appeal with costs.

Analysis And Determination

25. We have considered the written submissions by and on behalf of the parties herein as highlighted by learned counsel.
26. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions always bearing in mind that we have neither seen nor heard the witnesses and hence we should make due allowance in this respect. However, we are not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See *Selle v Associated Motor Boat Co* [1968] EA 123, *Abdul Hameed Saif-v - Ali Mohamed Sholan (1955)*, 22 *EACA*, 270 and *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212.
27. From the evidence on record, it is clear that the suit property, Mombasa/Block XXXII/4, was a Government leasehold property whose head lessee was the Late Hussein Adarus. Upon the death of Hussein Adarus, the 4 flats comprised in the suit property devolved to his children Asma Hussein, Shihabdin Hussein Adarus, Munaa Hussein Adarus, Shifaa Hussein Adarus and Aidarus Hussein Adarus. Muna and Shifaa are the Respondents herein and they were bequeathed Flat Nos 3 and 4. However, Shihabdin Hussein Adarus, also deceased, sold his interest in respect of Flat No 2 on the first floor to the Appellant herein who, being desirous of renovating the same, sought the consent of Aidarus Hussein Adarus, one the administrators of the Estate of the Late Hussein Adarus. The said Aidarus Hussein Adarus purported to give that consent on behalf of the Respondents herein who, being outside the Country, the Appellant was unable to get in touch with. Armed with the said consent and purported approvals from the Municipal Council of Mombasa, a letter from the National Environmental Management Authority and Mombasa Old Town Conservation Office, the Appellant commenced the said construction. Though the Respondents took issue with the propriety of the alleged approval from the Mombasa Municipal Council, that was not the basis upon which the impugned decision was arrived at and therefore does not fall before us for determination. The decision of the Learned Trial Judge was based on the fact that though required, the consent of the Respondents was never obtained by the Appellant before the said construction was commenced. This requirement was based on paragraph 4(c) of the sublease which stated that:

' Not to make any structural alteration or structural addition to the demised premises not to erect any new structures thereon or remove any of the landlord's fixtures without obtaining the prior written consent of the Lessors which consent shall not be unreasonably withheld.'

28. It is clear from the contract made between the Appellant and Kilifi Coral Works which was annexed to the replying affidavit in opposition to an interlocutory application that the scope of the works involved were, as the Learned Trial Judge found, of a fundamental nature warranting the approval of all the lessors. That the Appellant made some move towards obtaining the consents is a clear proof that the



Appellant appreciated that the consent of the Respondents was required before the said works could be undertaken, the approval of the relevant authorities notwithstanding.

29. It was submitted that by acquiring leasehold interest from the Late Shihabdin Hussein Adarus, the Appellant became a co-owner of the suit property and therefore did not require the Respondents' consent. This argument is self-defeatist since it contradicts the Appellant's case that she did obtain the consent. Paragraph 4(c) of the sub-lease was clear that any structural alteration or structural addition to the demised premises or the erection of any new structures or remove any of the landlord's fixtures from the demised premises was not permitted without obtaining the prior written consent of the Lessors. According to the Sub-lease in respect of Flat No. 2, the lessors were named as Asma Hussein Adarus, Shihabdin Hussein Adarus, Muna Hussein Adarus, Shifaa Husein Adarus and Aidarus Hussein Adarus while Shihabdin Hussein Adarus was named as the lessee. It was Shihabdin Hussein Adarus's leasehold interest granted pursuant to this lease that was transferred to the Appellant. This is confirmed by the Certificate of Lease given on October 25, 2001 issued as a result of the said Lease in which at the property section, Asma Hussein Adarus & 3 others are described as Sub-Lessors while Kalthum Abdillahi Omar is described as Sub-lessee. In other words, what was transferred to the Appellant was not Shihabdin Hussein Adarus's interest in the suit property as a lessor but his interest as a lessee. Accordingly, the Appellant could not claim that she became a co-owner by virtue of the acquisition of the Shihabdin Hussein Adarus's interest in the suit property. Therefore, it was incumbent upon the Appellant, pursuant to paragraph 4(c) of the said sub-lease to obtain the consent of all the lessors before any structural alteration or structural addition to the demised premises or the erection of any new structures or remove any of the landlord's fixtures from the demised premises could be done.
30. Based on the evidence on the record, we agree with the Learned Trial Judge that the Appellant required the consent of the lessors including the Respondents before she could undertake the constructions in question
31. The question that then follows is whether that consent was sought and obtained. From the Appellant's own evidence, adduced through DW1, the Appellant did not know how to get in touch with the Respondents who were out of the country. It is therefore clear that the Appellant did not directly get in touch with the Respondents concerning the consent. According to the Appellant's statement dated March 4, 2014, she commenced construction and renovation with the consent/approval of Aidarus Hussein Adarus who was a brother and agent of the Respondents and the Co-administrator of the Estate of Hussein Adarus. As regards the capacity of Aidarus Hussein Adarus as the Co-administrator of the Estate of Hussein Adarus to transact any business on behalf of the Respondents, that power ought to have come to an end once the suit property was distributed and the Respondents registered as the proprietors in common of the suit property and there is no evidence that there was any residual power left to the said Aidarus Hussein to transact any business on behalf of the Respondents. Accordingly, Aidarus Hussein Adarus could no longer fall back on his power as a Co-administrator and give a consent on behalf of the Respondents.
32. On the issue of Aidarus Hussein Adarus's agency, there was no evidence that the Respondents appointed him as their agent for the purposes of transactions as regards their interest in the suit property. Since the Respondents denied that they had authorised the said Aidarus Hussein Adarus to be their agent, it was incumbent upon the Appellant who was alleging that he was the Respondents' agent to prove that fact. Section 109 of the *Evidence Act* provides that:

' The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person.'



33. Since it was the Appellant who wished the Court to believe that Aidarus Hussein Adarus was the Respondent's agent, the burden of proving that fact was on him. Though the said Aidarus Hussein Adarus recorded a statement in the suit, he was never called to testify. It follows that his statement had no evidential value and could not be relied upon to support the Appellant's case. To the contrary, the fact that he was not called after recording a statement could be a ground for making an inference that had he been called, his evidence would have been adverse to the Appellant's case. It follows that there was no evidence to support the allegation that Aidarus Hussein Adarus was authorised to give consent on behalf of the Respondents to enable the Appellant carry out her construction in the suit property. We agree with the Learned Trial Judge that though required, the consent of all lessors, particularly the Respondents, was never sought and obtained by the Appellant before she embarked on her construction work in the suit property.
34. The Appellant contended that the renovations in question would have added value not only to the Appellant's flat but to the whole property. That is however, not the issue. The issue is whether or not the renovation was undertaken in accordance with the provisions of the Sub-lease.
35. We have re-evaluated the evidence on record and we find that there is no valid ground for faulting the decision of the Learned Trial Judge. Based on the evidence adduced the decision was factually and legally sound. In the premises we find this appeal unmerited and dismiss it with costs to the Respondents.
36. It is so ordered.

Dated and delivered at Mombasa this 9th day of June, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

