



**Birithia v Mshila & another (Environment & Land Case 292 of 2018)
[2024] KEELC 3718 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 292 OF 2018**

NA MATHEKA, J

APRIL 23, 2024

BETWEEN

STANLEY THINE BIRITHIA PLAINTIFF

AND

CLEMENT MWAKIO MSHILA 1ST DEFENDANT

**SABASTIAN MSHAMBA KIWO (BEING SUED AS THE ADMINISTRATORS IN
THE ESTATE OF CHRISTINA MAGHANGA) 2ND DEFENDANT**

JUDGMENT

1. At all material times to this suit, the Plaintiff was the registered owner of the Suit Property number 4745/VI/MN and the Defendant was the owner of the house without land erected thereon. The Plaintiff avers that he obtained ownership from the previous owners Abdalla Said Hemed, Juma Omar and Mariam Mohamed Musa vide a transfer dated 13th November 2015 where he had bought the Property for value. He further avers that he bought the Property after the Defendant had rescinded its right to first option of purchase from the previous owners. The Plaintiff avers that having bought the suit Property, he had assumed the rights and duties of the previous owners and was entitled to receive ground rent from the Defendant and currently collects rent from the tenants who reside in the 'house without land'.
2. The Plaintiff is aware that the Christina Maghanga is deceased and that her Estate is under the care of one Clement Mwakio Mshila, and Sabastian Mshamba Kiwo who currently collect rent from tenants who reside in the house without land erected on the Suit Property. The Plaintiff avers that he has never received any ground rent from the Defendants despite various directions and communication from the Defendant to remit the same to him.
3. That vide a letter dated 9th April, 2018, the Plaintiff through his advocates instructed Elnora Mkiwo, one of the active beneficiaries on the amounts owing from the house and that the ground rent payable



was Kshs 2,500/- a month from the 1st November 2017 which arrears then stood at Kshs 10,000/-. The continued blatant and adamant refusal by the Defendants to remit monthly ground rent to the Plaintiff has rendered the Plaintiff unable to deal in the Suit Property and procure economic gain. The Plaintiff avers that he has, on various occasions, asked the Defendants to enter into a formal lease agreement with him in respect to the issue of ground rent and the 'house without land' interest but his overtures have been ignored or rebuffed. The plaintiff prays for judgment against the defendants for:

- a. An order of demolition allowing the Plaintiff to demolish the house without land erected on the suit Property.
 - b. In the alternative and without prejudice to the above, the Plaintiff be allowed to treat the persons occupying the premises as his tenants.
 - c. Costs of this Suit; and
 - d. Any other Remedies this honourable Court may deem just and fair.
4. This court has considered the evidence and the submissions therein. The plaintiff bought a parcel of land known as L.R No. 4745/VI/MN from the previous owners. The defendants are the beneficiaries and/or administrators of a house that is being rented out. The tenure of the deceased is that of house without land which although not recognized by the land laws is a common practice in the coastal areas. The plaintiff's grievance is that upon purchase of the suit property he assumed the rights and privileges of the previous owners specifically the right to collect ground rent but the 1st defendant has refused and/or ignored to pay the same. Despite the plaintiff sending notices to the defendants, the 1st defendant refuses to pay the ground rent.
5. In their defence, the defendants claimed that they were not aware of that change of ownership and that they had been dutifully paying the normal ground rent to the advocates of the previous owners. They deny any communication from the plaintiff or the plaintiff's advocates with respect to collection of ground rent. During hearing, PW1 the plaintiff testified that he bought the suit property from Said Hemed for Kshs. 550,000 and the same was transferred to him in 2015 as shown by PEX 1, a certificate of title issued on 26th November 2015. He relied on his statement dated 1st December 2018 where he stated that he bought the suit property from Juma Omar Musa, Mariam Mohamed Musa and Abdalla Said Hemed.
6. DW1, Clement Mwakio claims that he is a beneficiary of the estate of the late Christine Maghanga and admits that the plaintiff was the owner of the suit property. He stated that he was willing to continue paying rent and that they never paid the plaintiff because they could not agree on the ground rent. Furthermore, DW1 testified that they were not given the first priority in purchasing the suit property and instead the plaintiff wanted to sell it to them at Kshs. 4 million.
7. DW2, the defendant herein testified that the house on the suit property belonged to his late mother and that they paid ground rent until 2016. He admitted that the suit property belonged to the plaintiff and that they paid ground rent to Swaleh & Co. Advocates and produced DEX 5 which are receipts of rent collected by the same on behalf of Mohamed Bin Musa. It is trite to note that Mohamed Bin Musa is one of the previous owners who sold the suit property to the plaintiff.
8. Counsel for the plaintiff in his submissions stated that it is not in dispute that the plaintiff is the registered owner of the suit property as shown by PEX1. Counsel also stated that the house on the land belonged to the defendants as beneficiaries of the estate of the late Christina Maghanga. They also stated that a dispute arose when the plaintiff increased rent from Kshs. 500 to 2,000 per month and that the defendant stopped paying in 2015. Counsel is adamant that despite the defendant not paying



rent he has still been collecting rent from his tenants which they state is a violation of the plaintiff's right under article 40 of *the constitution*.

9. I find that this is a case where a person can own a house without owning the land upon which the house stands. In *Famau Mwenye & 19 others vs Mariam Binti Said*, Malindi H.C.C.C. No. 34 of 2005 (Ouko, J.) (as he then was) described the concept of 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 law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

10. In the case of *Murtahar Ahamed Dahman & Another vs Athuman Sudi* (2013) eKLR Angote J, had the following to say regarding the concept of a house without land:

“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 it the peculiar historical ties unlike the other part of the country. It is common knowledge that were 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 thing embedded for the permanent beneficial enjoyment of that to which it is so attached. 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. 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 are, however, supposed to be noted in the certificate of title. 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.

11. The concept of owning a house or coconut trees by a person who is not the owner of the land was and still being used by absentee landlords to either generate an income for themselves or to forestal the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years. This interesting concept of “owing a house or coconut trees without land” as recognized 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. 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.
12. 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. ”
13. The Defendants have not disputed the averments and testimony by the Plaintiff's that they bought a parcel of land known as L.R No. 4745/VI/MN on which they have their rental house erected under the phenomena of house without land and state that they have been paying monthly ground rent to persons other than the Plaintiff. I have perused the payment receipts adduced as evidence by the



Defendants and note that they relate to the period upto 2014. There is no proof of payment from 2015 to date. I find that this rent is due and owed to the Plaintiff.

14. 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 one yearly rent is reserved, can only be made by a registered instrument. The site acquired by the Defendants for the erection of their house under oral agreements is not under registered instruments. Where a party enters upon the land of another and erects a building with the permission of the land owner, such lease, 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 before entry.

15. In *Arif vs Jadunath Majdma* (1930) Vol. VII Indian Appeal, 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 the order of ejection after a month's notice to remove his structures and restore the land to its original state.”

16. In *Said Bin Seif vs Sharif Mohammed Sharty* (1940-1) part II, Vol. XIX, KLR 9, Lucie Smith J, 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.”

17. The Defendants have stated that they do not have any objection to continue paying the ground rent to the rightful owner of the suit plot at the rate of kshs.500/= per month. They had also expressed their intention to purchase the land from the rightful owner. I take judicial notice that under the Land Titles Act (repealed) the peculiar phenomenon of “houses without land” were recognized that the properties belongs to the Defendants. Accordingly, they cannot be demolished without following the proper procedure dealing with landlord and tenant relationships. For the above reasons, the Court finds that the Plaintiff's case is merited. I am satisfied on the evidence placed before me that the Plaintiff has proved his case against the Defendants on a balance of probabilities. Accordingly, I enter judgment for the Plaintiffs against the Defendants and make the following orders;

1. The Defendants are to pay the Plaintiff rent at the rate of Kshs 500/= per month from 2015 to the date of this judgement with interest at court rates until payment in full.
2. Thereafter the Plaintiff is to treat the Defendants as tenants and be at liberty to renegotiate the rent to be paid going forward with them.
3. The Defendants to bear the costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF APRIL 2024.



N.A. MATHEKA

JUDGE

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