



**Yusuf v Mohamed & another (Environment & Land Case  
213 of 2018) [2024] KEELC 3354 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3354 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 213 OF 2018**

**NA MATHEKA, J**

**APRIL 23, 2024**

**BETWEEN**

**KHADIJA FAMAU YUSUF ..... PLAINTIFF**

**AND**

**MOHAMED HAFIDH MOHAMED ..... 1<sup>ST</sup> DEFENDANT**

**REHEMASHEE BIN ALI (AS ADMINISTRATOR OF THE ESTATE OF THE  
LATE MAMA KOBANA SALIM KHAMIS K. MTWAF) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This case is that by an agreement in writing dated 28<sup>th</sup> April, 2003 (hereinafter referred to as the agreement) and made between the 1<sup>st</sup> defendant and the plaintiff, the 1<sup>st</sup> defendant out of love and affection for the plaintiff who at that particular time was his wife, agreed to transfer the house sitting on the plot referred to as subdivision number 34 on plot number 938/111/MN in Mtwapa, Kilifi County. Sub-division of plot number 938/111/MN has been concluded but title deeds have not been issued to individuals who bought the sub-divided plots. Nevertheless, the arrangement between the late Mama Kobana Salim Khamis the hitherto proprietor of plot 938/111/MN and individuals residing therein, was that title deeds would be issued to those who have paid for the sub-plots as agreed.
2. The plaintiff was in possession of the property up until the 1<sup>st</sup> defendant issued her with a divorce and had during the period of possession, made several renovations, structural adjustments and modifications to the property at her own cost out of the legitimate expectation that the property would eventually be transferred to her name. The plaintiff and the 1<sup>st</sup> defendant were married under Islamic Law but divorced in 2005. After they were divorced, the 1<sup>st</sup> defendant threw the plaintiff out of the house and refused to recognise the plaintiff as the proprietor of the house and plot. Nevertheless, the 1<sup>st</sup> defendant did not at any time rescind the agreement which stands to date. That there has been a long standing dispute before the Kadhi's Court between the heirs of the late Mama Kobana Salim Khamis Mtwafy regarding the issue of inheritance of the whole property which also prevented the 2<sup>nd</sup>



defendant from appending his/her signature on the transfer forms and application for consent of the Land Control Board. As a consequence, thereof the time within which to apply for the consent of the Land Control Board lapsed. The plaintiff prays for judgment against both defendants for;

- a. A declaration that sub-division 34 of plot number 938/111/MN and the house therein belong to the plaintiff.
  - b. The time within which to apply for consent from the Land Control Board be extended.
  - c. An Order of Specific Performance to compel the 2<sup>nd</sup> defendant to execute the necessary documents and forms including the application for the consent of the Land Control Board and transfer forms within 7 days from the date of service of the order and in default, the deputy registrar to execute such documents and forms and take such steps in the place of the 2<sup>nd</sup> defendant.
  - d. Costs of this suit
3. The 1<sup>st</sup> defendant denies he transferred his house on Plot No. 938/111/MN to the plaintiff herein as alleged or at all as he challenges the authenticity of the signature in the Agreement dated 28<sup>th</sup> April, 2003. The 1<sup>st</sup> defendant denies that the plaintiff was in possession of the 1<sup>st</sup> defendant's property as alleged or at all as the plaintiff was only staying thereon by virtue of her marriage to the 1<sup>st</sup> defendant.
  4. This court has considered the evidence and the submissions therein. The plaintiff and the 1<sup>st</sup> defendant were married under Islamic law until their it is divorce sometime in 2005. During the subsistence of marriage, the plaintiff states that, the 1<sup>st</sup> defendant out of care and deep affection gifted the her a house on subdivision 34 (hereafter suit property) on a parcel of land known as L.R. NO. 938/III/MN. The plaintiff alleged that the gift was put in writing through and agreement dated 28<sup>th</sup> April 20203. The late Mama Kobana Salim Khamis who was the registered proprietor of the above-mentioned parcel had made arrangements with all parties who had bought subdivisions in the said parcel that title deeds would be issued upon completion of payment. The plaintiff alleges that she possessed sub division 34 and developed the same with the hope that the property would be transferred to her. However, the plaintiff states that there is a succession dispute with regards to the whole parcel in Kadhi's court which has prevented any transfer of the subdivisions.
  5. In a rejoinder, the 1<sup>st</sup> defendant denies that he made any agreement with the plaintiff and he even challenges the authenticity of the signature on the same. The 1<sup>st</sup> defendant also denies that he is required to apply for a consent from the Land Control Board as he did not gift the plaintiff and that she was only living on the suit property then as a wife. It is also trite to note that the 1<sup>st</sup> defendant challenged the orders of the divorce proceedings through a judicial review for order of *certiorari* in HCCMISC App 79 of 2011 whereby the Muriithi J. quashed the judgment of the Kadhi's Court.
  6. During hearing, the plaintiff was the only witness PW1 and she testified that she married to the 1<sup>st</sup> defendant in 1988 out of which were born two issues. During the subsistence of marriage, the 1<sup>st</sup> defendant sent her packing but lured her back into the marriage with the promise of giving her the house on the suit property. Unfortunately, around two years later they divorced but she continued living on the suit property for another 11 years. She lived there with other people who were tenants in the house on the suit property until the 1<sup>st</sup> defendant evicted her and she moved to Malindi but left her children in the said house. In cross examination, the plaintiff stated that the 1<sup>st</sup> defendant signed the afore mentioned agreement PEX1 in 2003 but admitted that they never attended the Land Control Board. Further, she testified that the power utility invoices were in the name of her child who was born



out of wedlock. She also admitted that she did not have any agreement with the estate of the late Mama Koban Salim Khamis and had 3 tenants.

7. The 1<sup>st</sup> defendant, DW1 testified that he currently lives on the suit premises. He explained that before then he was living in Bamburi and that the plaintiff brought in the tenants during the High Court judicial review case. He testified that he did not sign the said agreement. It was averred in the pleadings of both the 1<sup>st</sup> and 2<sup>nd</sup> defendant that the late Mama Kobana Salim Khamis was the registered owner of the parcel of land known as L.R No. 938/III/MN in Mtwapa. However, no certificate of title/title deed was produced by either party in the entire proceedings. Section 26 (1) of the [Land Registration Act](#) (CAP 300) provides as follows;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme...”
8. The plaintiff claims ownership of the suit property given out of love without any supporting documentation as to ownership. The court is not certain that the 1<sup>st</sup> defendant had legitimately and conclusively purchased the suit property from the late Mama Kobana Salim Khamis. It is on record that parcel No. 938/III/MN has an ongoing succession battle at the Kadhis Court. There is no evidence of ownership of the suit property adduced in this court. The plaintiff seeks specific performance for this court to compel the 2<sup>nd</sup> defendant to execute the necessary documents and forms including the application for the consent of the Land Control Board and transfer forms within 7 days from the date of service of the order and in default, the deputy registrar to execute such documents and forms and take such steps in the place of the 2<sup>nd</sup> defendant. In [Thrift Homes Ltd v Kenya Investment Ltd](#) 2015 eKLR, the court stated that;

“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

9. Be that as it may it has come out in evidence that the property belongs to a third party who was not privy to the contract between the plaintiff and the 1<sup>st</sup> defendant. The remedy of specific performance cannot obtain in the circumstances. Even if the court was to find that there exists a valid contract between the two the 1<sup>st</sup> defendant does not have the capacity to transfer the same to the plaintiff. It is also in evidence that the suit land is subject to another court case not before me and no evidence has been adduced that ownership has not been determined. I find that the plaintiff has failed to establish her



case on a balance of probabilities and the same is dismissed with no orders as to costs as the parties were once husband and wife.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF APRIL 2024.**

**N.A. MATHEKA**

**JUDGE**

