



**Swaleh & another (Suing as the Administrators of the Estate of Fatuma Mohamed Athman alias Fatuma Mohamed) v Ali & another (Environment & Land Case 201 of 2017) [2024] KEELC 5387 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5387 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 201 OF 2017**

**SM KIBUNJA, J**

**JULY 24, 2024**

**BETWEEN**

**BARIKA FARAJ SWALEH ..... 1<sup>ST</sup> PLAINTIFF**

**SALEH FARAJ SALEH ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF FATUMA  
MOHAMED ATHMAN ALIAS FATUMA MOHAMED**

**AND**

**ABDULMANAFI ALI ..... 1<sup>ST</sup> DEFENDANT**

**ABDILLAHI ALI ..... 2<sup>ND</sup> DEFENDANT**

***(Suing as the Administrators of the Estate of Fatuma Mohamed Athman alias Fatuma Mohamed)..... PLAINTIFFS)***

**JUDGMENT**

1. The plaintiffs sued the defendants through the amended plaint dated 16th July 2019, and filed on the 1<sup>st</sup> August 2019, seeking for the following prayers:
  - a. “A declaration that the deceased Fatuma Mohammed Athman alias Fatuma Mohamed is the owner of the  $\frac{3}{4}$  interest in all that house without land No. 300 standing on Plot No. XVIII/MI at Sarigoi within Mombasa Island and further that the heirs of the said Estate are the current rightful owners of the said house.
  - b. That the defendant and her sons shall forthwith account for the recent proceeds of the said 4 rooms, store and kitchen, that they have been illegally and irregularly occupying since 2010 to date.



- c. That the costs of this suit be borne by the Defendants herewith.”

The plaintiffs aver that the late Fatuma Mohamed bought  $\frac{3}{4}$  of a property, house No. 300, on wakf of Mohamed Bin Omar Alaufi, on plot No. 60/XVIII/MI, from Athman Khamis, alias Fatuma Mohamed Athman. That the late Fatuma Mohamed had successfully sued the late Zainab Faki Mahfudh over the suit property through the Mombasa Kadhi’s Succession Petition No. 129 of 1010, which decision was later overturned for lack of jurisdiction, in Mombasa HCCA No. 1 of 2012.

2. The late Zainab Faki, who was the original defendant, entered appearance through the memo dated 27th June 2017, and opposed the plaintiffs’ claim through the statement of defence dated 10th July 2017, inter alia averring that the late Mzee Athman Khamis had borrowed Kshs. 3500 from the late Fatuma Binti Mohamed in 1974, and put up the house on the suit property as collateral, on the understanding that the late Fatuma would collect rent from the said house until the loan is repaid in full. That the suit should be dismissed with costs.
3. The suit proceeded to hearing on 30th January 2024 when the 2<sup>nd</sup> plaintiff testified as PW1. He adopted his statement dated 8th June 2017 as his evidence in chief, and produced the documents in the list of documents of even date as exhibits. He testified that his late mother had bought  $\frac{2}{4}$  and  $\frac{1}{4}$  of the Swahili house subject matter of this suit from Athman Hamisi and Fatuma Athman Hamisi respectively, making a total of  $\frac{3}{4}$ . That the late Zainab Faki Mahfudh, took control of the whole house instead of the  $\frac{1}{4}$  share that remained. That they took the dispute to the Kadhi’s court but they were advised to come to this court. That the current defendants are the sons to the late Zainab Faki Mahfudh.
4. The learned counsel for the plaintiffs filed their submissions dated the 20<sup>th</sup> February 2024, which the court has considered.
5. The following are the issues for the court’s determinations:
  - a. Whether the plaintiffs have proved their case on a balance of probabilities.
  - b. Who pays the costs in the suit?
6. After considering the pleadings filed, evidence tendered by PW1, submissions by the plaintiffs’ counsel, the court has come to the following determinations:
  - a. This suit is undefended but nevertheless, the plaintiffs have to prove their case on a balance of probabilities. The subject matter in question is a house without land, which is still part of the land. Courts have interpreted this unique jurisprudence to mean that the owner of the house is different from the owner of the land. In the case of *Famau Mwenye & 19 others vs. Mariam Binti Said*, Malindi H.C.C.C. No. 34 of 2005, the court 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’].”
  - b. The plaintiffs did not produce the registered owner of parcel 60/XVIII/MI, where the subject house is situated. The plaintiffs had however disclosed in their pleadings that the land is registered under the wakf of Mohamed Bin Omar Alaufi. At page 39 of the afore mentioned list



of documents, the house without land was registered under the repealed Chattels Transfer Act to Athman Khamis on 8th November 1965. Thereafter, under the sale agreements attached at pages 49 and 50 of the aforementioned list of documents, Bwana Mzee Athman and Fatuma Binti Athman are shown to have sold their 2/4 and 1/4 shares respectively, of the house to Fatuma Binti Mohamed represented now by the Plaintiffs. It is also shown that Ali & Zahran gave their consent for the transaction.

- c. Under Section 107 of the *Evidence Act* Chapter 80 of Laws of Kenya, the one who alleges must prove. The plaintiffs have through the documents produced as exhibits and the testimony of PW1 tendered proof in support of their claim over the 3/4 share of the house as pleaded in their amended plaint. Though the defendants had filed a defence, they did not tender any evidence in support of their averments, which invariably remains mere statements, and incapable of challenging the plaintiffs' claim.
  - d. Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, costs always follow the event unless where there is a good reason to depart from the general rule. I find no good cause to depart from that general rule and the plaintiffs will have costs.
7. Flowing from the foregoing, the court finds that the plaintiffs have on a balance of probabilities proved their claim against the defendants. The court enters judgement in their favour and orders as follows:
- a. That a declaration in terms of prayer (a) of the amended plaint dated the 16th July 2019 is hereby issued.
  - b. That the defendants are hereby ordered to give the plaintiffs possession and control of 3/4 of the Swahili house, subject matter of this suit, within thirty (30) days.
  - c. The plaintiffs are awarded costs.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24<sup>TH</sup> DAY OF JULY 2024.**

**S. M. KIBUNJA, J.**

