IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA)

CIVIL APPEAL NO. 141 OF 2018

BETWEEN

MUSA SALIM CHAI.....1ST APPELLANT

SALIM CHAI.....2ND APPELLANT

AND

ZAKAYO KAIYA KAIBUNGA.....RESPONDENT

(An appeal against the judgment and Decree of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 21st September 2018

in

ELC Case No. 358 of 2016.)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the Environment and Land Court at Malindi ***(J. O. Olola, J.)*** dated the 21st day of September 2018. The background to the appeal is that, ***Musa Salim Chai***, the (1st appellant herein), is the proprietor of a house standing on the ***Plot No. 69*** (original ***No. 1412***) Muyeye Water Project, Malindi, while the 2nd appellant ***(Salim Chai***), the first appellant's father, is the registered owner of the plot on which the house stands.

2. Sometime in the year 2007, the 2nd appellant granted the 1st appellant permission to construct a residential house on the said plot land for the 1st appellant's use and benefit. The 1st appellant then proceeded to construct a rental house which he rented out to tenants on a monthly basis.

3. On or about 12th June 2012, the 1st appellant entered into an agreement with the respondent in which he borrowed a sum of ***Kshs.252,000/*** from the respondent on the express condition that the 1st appellant shall surrender his house as security for the loan and would repay the loaned sum within 30 days, failing which the house would be sold to recover the money advanced without interest. The 1st appellant defaulted in the loan repayment. The respondent, instead of selling the house to recover his money,

proceeded to take ownership of the house and the parcel of land on which the house is erected and transferred the same to himself.

4. Unhappy with this act, the appellants went to court and sought orders for vacant possession, mesne profits, permanent injunction to restrain the respondent from collecting the rental income from the said house or dealing with it in any manner whatsoever, and costs of the suit.

5. The respondent refuted those claims in his statement of defence. He acknowledged that he entered into a friendly loan agreement with the 1st appellant for a sum of Kshs.252,000/ which was to be repaid within 30 days, failing which he would sell the 1st appellant's house to recover the money.

6. Following a full hearing, the learned judge dismissed the suit in its entirety. He found, *inter alia*, that although the 1st appellant breached the loan agreement; the respondent did not exercise due diligence in respect of the property he was accepting as security; and that the appellants had not proved that the respondent had been collecting any rent from the suit property.

7. The appellants were aggrieved by that decision and preferred this appeal, raising six (6) grounds of appeal, which may be summarized as follows: *That the learned judge erred in law and fact when: he failed to hold that the respondent had no right to take over ownership of the house that had been given to him as security for the loan; in finding that the 1st appellant acted fraudulently or recklessly; he failed to make an award of mesne profits to the 1st appellant; and in finding that the appellants' case had no merit and proceeding to dismiss it.*

8. When the appeal came up for hearing, both ***Mr. Shujaa*** and ***Mr. Mbura***, learned counsel for the appellants and the respondent respectively, chose to rely on their written submissions entirely.

9. On the first issue, the appellants faulted the learned judge for failing to find that the respondent had no right in law to assume ownership of the house together with the plot due to the express terms of the loan agreement with regard to the consequences of default on the part of the 1st appellant. It was submitted that the respondent had no right under the agreement to proceed to assume ownership of both the house and the plot, hence the judge in allowing the respondent to retain possession of the house together with the plot validated breach of express terms of the agreement.

10. It was further submitted that since the respondent had assumed ownership of the house and the plot, the house could therefore not be sold to recover the loan amount.

11. The appellants also contended that the respondent wrongfully relied on a letter dated 2nd July, 2013 allegedly written by the 1st appellant authorizing Kenya Power and Lighting Company Limited to use an earlier electricity supply quotation to a customer, and a letter dated 19th March, 2013 written by people who purported to be Muyeye Water Project Officials to the defunct Municipal Council of Malindi confirming a transfer of the plot made between the 1st appellant and the respondent as evidence of existence of purported oral consent by the 1st appellant to the transfer of the suit property to the respondent.

12. The appellants asserted that the contents of the said letters are not proof of a transfer of the house and the plot as between the appellants and the respondent. The transfer was neither produced nor even referred to by the respondent in his testimony. They maintained that the learned judge erred in failing to hold that the respondent had no right to assume ownership of the house together with the plot.

13. Secondly, the appellants submitted that the learned judge failed to consider the fact that although the 1st appellant had

initially defaulted in repaying the loan amount, he subsequently got some money and took steps to repay the loan but the respondent refused to accept payment and surrender possession of the said house and plot. The learned judge went further to hold that the 1st appellant was a fraudulent person and was extremely reckless with his father's property.

14. The appellants also faulted the learned judge for failing to make an award for mesne profits. In their view, the respondent had conceded that shortly after he took over the house and connected electric power supply, he had two tenants who were paying monthly rents of Kshs.2,500/ each for the two rooms they were occupying, out of the ten rooms. They had therefore proved that they were entitled to mesne profits of Kshs.25,000/ per month.

15. Lastly, the appellants contended that the 1st appellant did not have the capacity to enter into a transfer agreement with the respondent to transfer the plot as the letter dated 2nd July seems to suggest, for the reason that the plot belonged to the 2nd appellant and there was no privity of contract between him and the respondent. For these reasons, the appellants urged us to allow the appeal, set aside the impugned judgment and grant orders as prayed in the plaint.

16. Opposing the appeal, the respondent concurred with the learned judge's finding that the appellants having not repaid the said loan to date, the orders sought could not be granted to them.

17. On the issue of the 1st appellant being referred to as fraudulent, the respondent asserted that the 1st appellant acted fraudulently when he entered into an agreement to borrow the sum of Kshs.252,000/, knowing very well that the property he was offering as security did not belong to him and in failing to notify the 2nd appellant about the transaction.

18. It was his further submission that the 1st appellant acted fraudulently when he borrowed the money and issued cheques that were dishonoured upon presentation for payment

19. Turning to the issue of the learned judge failing to find that the house could not be sold to enable proceeds of the sale be used to repay the loan when he had already transferred ownership to himself, the respondent argued that first of all, the land on which the house stands belonged to the 2nd appellant, who was not a party to the loan agreement; secondly, the 1st appellant was still in breach of the agreement as he had not repaid the loan to date; and thirdly, the 1st appellant gave authority in writing to the respondent to apply for electricity supply to the said house. According to him, the 1st appellant did not come to court with clean hands.

20. As regards the issue of the respondent refusing to accept repayment of the loaned sum, the respondent asserted that the loan was to be repaid after 30 days as per the agreement. The 1st appellant wrote a letter to him on 6th December, 2016 asking him to collect the money, over 4 years and a half from the agreed repayment date. Moreover, the 1st appellant did not address the issue of the expenses incurred in renovating the house.

21. On the issue of mesne profits, the respondent contended that the appellants claimed that he had been receiving rent from the suit premises, that the appellants produced receipts from Nairobi Homes (Mombasa) Ltd bearing his names as proof that there were tenants paying rent, but there was no nexus between the said company and the respondent.

22. Lastly, the respondent maintained that the appellants were and still are in clear breach of the loan agreement, and that the 1st appellant was seeking to benefit from his own wrong doing. He urged us to dismiss the appeal with costs.

23. We have considered the grounds of appeal as well as submissions by counsel. Being a first appeal, it is our duty to analyze

and re-assess the evidence on record and reach our own conclusions**.** In ***Selle -vs- Associated Motor Boat Co. [1968] EA 123***, it was expressed:

*"**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is 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 demeanor of a witness is inconsistent with the evidence in the case generally** (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).**"***

24. From the record, it is evident that the appeal arises from the learned judge's exercise of discretion in dismissing the appellant's case. The principles that guide the interference or otherwise with the exercise of judicial discretion were succinctly put in ***Mbogo vs Shah [1968] EA 93***. Simply put, we can only interfere with the learned judge's exercise of discretion, if satisfied that the judge acted on matters on which he should not have acted, or, because he failed to take into consideration matters which he should have taken into consideration and in failing to do so arrived at a wrong conclusion, or; that he misdirected herself in some matter and as a result arrived at a wrong decision and as a result there has been a misjustice.

25. It is not disputed that on 12th June, 2012, the 1st appellant and the respondent entered into a friendly loan agreement. The terms of the agreement were as follows:

"WHEREAS ZAKAYO KAIYA KAIBUNGA has advanced MUSA SALIM CHAI a friendly loan of the sum of Kenya Shillings Two Hundred and Fifty Two Thousand (Kshs 252,000/=) on mutual condition that he shall immediately surrender his residential house situate on plot number 69 (original number 412) Muyeye Water Project Malindi as security against the aforesaid loan of which upon failure to repay the aforesaid loan within thirty (30) days from the date of execution hereof failure to pay the said loan by the said date stipulated both parties have agreed that the said house as security against the loan shall be sold to pay the lender(creditor) with no interest." *(sic)*

26. It is also not disputed that the 2nd appellant, who is the registered owner of the plot on which the house stands, was not privy to the loan agreement between the 1st appellant and the respondent. From the onset, the 1st appellant admitted that indeed he had defaulted in repayment of the loaned sum, and hence was in breach of the agreement.

27. The first issue raised was that the learned judge erred in failing to find that the respondent had no right to take over ownership of the house and the plot in issue. On 19th June, 2015, the County Government of Kilifi wrote a letter to the Town Administrator informing him that the transfer of ownership to the respondent was irregular since no due process was followed.

28. In his own admission, the respondent stated that *"I changed ownership to myself because he failed to pay back my money. The agreement did not say I take ownership of the plot."*

29. The agreement expressly stated, in the event of default in repayment of the advanced sum the house would be sold to recover the money without interest. That implies that if the sale proceeds exceeded the debt due, any amount over and above the sum of Kshs.252,000/ would revert to the 1st appellant. It is not clear why the respondent moved with haste to transfer ownership of both the plot and the house contrary to the terms of the agreement. In this regard, we agree with the appellants that the learned judge did not exercise his discretion judiciously.

30. On the second issue, the learned judge held that the 1st appellant was a fraudulent person or was extremely reckless with the property which he knew to be registered in his father's name.

31. There is no doubt that both parties were in breach of the agreement. The 1st appellant admitted that he had indeed failed to repay the money advanced to him by the respondent. The respondent on the other hand seized that opportunity to transfer ownership of the house and the plot to himself contrary to the express terms of the agreement. Both parties were aware that the plot did not belong to the 1st appellant.

32. It is noteworthy that in the coastal region one can own a house and not necessarily the plot on which the house stands. In ***Mariam Fadhili vs Samson Maricho Otweyo & 3 others [2016] eKLR*** this Court held:-

"Our land law regime is mainly dictated by statute and common law; both of which define land as not only the ground but the structures thereon. This is based on the Latin maxims '*cujus est solem ejus et usque ad coelum et ad inferos'* **which translates into 'whoever's is the soil, it is theirs all the way to heaven and all the way to hell' and '****quic quid planatur solo solo cedit'* **(whatever is attached to the soil becomes part of it). From the two maxims, land has by and large been defined to mean the ground and all fixtures thereon. However, courts have taken judicial notice of the Mohammedan concept of ownership of 'a house without land' that is prevalent at the coast. This concept works on the premise that proprietorship of land and of the structures thereon can be mutually exclusive. A person may own one without necessarily owning the other. This proposition found support under the provisions of the** *Land Titles Act cap 282* **(repealed) which governed land registration at the coast. Under the Act, interests in land required registration, with** *Section 55(b)* **recognizing houses and coconut trees as such interests or holdings whose proprietorship could be independent of the land. (See** *Muhiddin Mohamed v. Jackson Muthama & 168 others [2014] eKLR***. Upon registration, a certificate of registration would issue, which would act as proof of legitimacy of the proprietor's interest."**

33. It was on the concept of "*house without land*" that the 1st appellant gave security of the house to the respondent and not the land. In as much as the 2nd appellant was not party to the agreement, he was cognizant of the express terms of the agreement between his son and the respondent. In his letter dated December, 2014, he expressed as follows:

"This agreement had a condition to the effect that in the event he failed to pay the loan in time the house may be sold so as to pay the lender. The agreement did not provide for the transfer of the plot in case he failed to refund the money.

Surprisingly when he failed to refund the money in time my name was replaced with that of Zakayo Kaiyaa Kaibunga in the registrar of plot owners at the Malindi Subcounty offices. The security in the loan agreement was limited to my son's house only, it did not extend to the plot which was owned by me, as such the transfer of the plot ownership from my name to the name of Zakayo Kaiya Kaibunga was therefore illegal."

34. In light of that letter, it is our considered view that the 2nd appellant did not have a problem with his son selling his house that was situate on his land. His main concern was transfer of ownership of the land. We therefore find that the respondent's aspersions that the 1st appellant acted fraudulently when he entered into an agreement to borrow the sum of Kshs.252,000/ from the respondent knowing well that the security did not belong to him was not founded.

35. Further, the respondent's actions of transferring the land irregularly and refusing to accept repayment of his money, albeit late, could only amount to unjust enrichment as he wanted to unjustly enrich himself by owning the entire property, knowing well that the value of the house and the plot was way higher than the amount owed. We are unable to find any element of fraud on the 1st appellant's part. Therefore, we find that the learned judge erred in finding that the 1st appellant acted fraudulently.

36. As regards the issue of mesne profits, the 1st appellant produced various receipts for payment of rent from a tenant by the name Lydia Wanjala. The receipts were issued by Nairobi Homes (Mombasa) Ltd on account of the respondent. There was no evidence that the said tenant was residing in the suit property, and neither did the 1st appellant adduce sufficient evidence as to the

amount of rent that was being collected by the respondent. The house has ten rooms. The 1st appellant did not tell the court whether all the rooms had tenants. The respondent testified that he had only two tenants who were paying monthly rents of Kshs.2,500/ each. In the circumstances, the appellants did not prove that the respondent was collecting rent of Kshs.25,000/ per month, which was the amount claimed as mesne profits. In the absence of such proof, the learned judge could not have awarded the claimed sum.

37. In ***Peter Mwangi Mbuthia & another vs Samow Edin Osman [2014] eKLR***, this Court expressed as follows:

"Apart from the reference in the demand letter before action that was exhibited to the respondent's affidavit in support of the summary judgment application, there was not the slightest indication how that figure was arrived at. Indeed counsel for the respondent had difficulty defending that amount merely stating that the figure was not challenged. We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established." (Emphasis ours)

38. Lastly, the learned judge in dismissing the appellant's suit expressed as follows;

"While it may not have been right for the defendant to transfer the property to himself as he purported to do, I think it would be unfair to grant the orders sought herein wherein it is admitted that the plaintiffs are yet to pay the amount that was lent or to sell the house to use the proceeds for payment as agreed."

The learned judge held that the appellants could not be granted the reliefs they were seeking because they did not have clean hands.

39. In our view, the learned judge's action of refusing to grant the said orders, especially for vacant possession, amounted to approval of an illegality and unjust enrichment on the part of the respondent. The respondent took possession of the house in March 2013 or thereabout. No doubt he has collected substantial rent over the last seven or so years, probably much more than the amount he advanced the 1st appellant and the amount he used to renovate the house and connect electricity supply thereto. No wonder the respondent did not file a counterclaim for repayment of such sums, if at all he considered the amount due to him from the appellants to be less than the amount that he has so far collected as rent. Had the learned judge taken all these factors into consideration, we believe he would have exercised his discretion in favour of the appellants.

40. The upshot of all the above assessment and reasoning is that we find merit in this appeal in terms of prayer (a) and (c) of the plaint. Consequently, we allow the appeal, set aside the judgment of the lower court and substitute therefore orders granting the appellants vacant possession of plot No.69 (original No.412) Muyeye Water project within Malindi Town together with the house standing thereon. We further restrain the respondent, his servants and/or agents by way of a permanent injunction from continuing to collect rental income from the said house or dealing with it in any manner whatsoever. The appellants shall have the costs of this appeal as well as costs of the High Court matter.

Dated and delivered at Nairobi this 24th day of April, 2020

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR