



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 22 OF 2020

IN THE MATTER OF JAGDISH RAM SINGH BHATTI

RAJ SINGH BHATTI.....PETITIONER

-VERSUS-

DHRUV KUMAR BHATTI.....1ST RESPONDENT

MOHAN RAM SINGH BHATTI.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner, Raj Singh Bhatti, through his petition dated 24th January, 2020 is seeking to be reinstated to the property known as LR No. 209/7509 at 308 Ewaso Ngiro Park situate in Lavington Nairobi (hereinafter referred to as the “suit property”). The property is registered in the name of the subject of these proceedings, Jagdish Ram Singh Bhatti (hereinafter simply referred to as Mr. Jagdish).

2. The Petitioner claims that he is the eldest son of Mr. Jagdish in a family of six children consisting of three sons and three daughters. His two brothers Dhruv Kumar Bhatti and Mohan Singh Bhatti are the respective 1st and 2nd respondents herein. He avers that their mother passed away in March 1988 and that he, together with the respondents, are collectively the eventual beneficiaries of the suit property in equal shares according to the last will and testament of their father marked as “RSB 2”. It is the Petitioner’s deposition that their father, Mr. Jagdish, has been suffering from an impaired memory since 1997 and has been diagnosed as having degenerative spondylosis and severe vertigo with frequent episodic vertigo.

3. The Petitioner avers that although the suit property represents the main family asset, he also purchased the front half of Jodhpur Building situate in Rajasthan, India which also belonged to his father for the sum of 165,000 pounds sterling but the rear of the building continues to be owned by the respondents and himself in equal shares. In his view, this transaction did not sit well with his brothers. It is the Petitioner’s deposition that the respondents surreptitiously and unbeknown to him, persuaded their father to transfer the suit property to them. He nevertheless admit that this assertion has never been verified by the presentation of documentary evidence. In any event, he posits that the transfer of the suit property would be an unfair transaction and in breach of the trust which existed over the property. Further, that he purchased the Jodhpur Building unlike the respondents and the value of the said properties were not the same. He therefore avers that the respondents coerced their father to transfer the property to them although they have refused to produce the documents evidencing the transfer and he is therefore apprehensive that he might have lost his share in the suit property.

4. It is also the Petitioner’s averment that as a result, the respondents resorted to harassing his wife and son who also lived on the suit property and turned their father into a guest in his own home. He further deposes that the respondents orchestrated his removal from the suit property, removed his personal possessions from the suit property thereby locking him out of the only home he has known since his childhood. Consequently the Petitioner seeks orders as follows:-

a. The Petition be certified very urgent and heard without delay;

b. The Respondents do reinstate the Petitioner/Applicant to the Property forthwith;

c. The Respondents be precluded from harassing the Petitioner/Applicant whether by themselves or by their servants or agents;

d. This Honourable Court to appoint a medical practitioner to assess whether by reason of impaired memory or as a

consequence of undue influence, Jagdish Ram Singh Bhatti is incapable of managing his financial and legal affairs;

e. Until the medical assessment is concluded, Raj Singh Bhatti, be appointed the guardian of Jagdish Ram Singh Bhatti and manager of his estate with general power for the management of the estate, business/financial matters, legal transactions and other dealings and affairs of a similar kind;

f. After hearing this petition *inter partes* Raj Singh Bhatti be appointed guardian of Jagdish Ram Singh Bhatti and manager of his estate with general power for the management of the estate, business matters, legal transactions and other dealings and affairs of a similar kind;

g. The purported transfer of LR No. 209/7509-308 Ewaso Ngiro Park, Lavington, Nairobi, Kenya by Jagdish Ram Singh Bhatti to the Respondents, Dhruv Kumar Bhatti and Mohan Ram Singh Bhatti, be declared null and void in the circumstances where the transfer was procured by undue influence over Jagdish Singh Bhatti by the Respondents or each of them.

h. Costs be provided for.

5. In response, the subject of these proceedings, Mr. Jagdish, filed a replying affidavit sworn by himself on 4th February, 2020. He deposes that contrary to what has been stated by the Petitioner, he is of sound mind and enjoys good health. Further, that he has been subjected to a mental examination which certified that he is in good physical state and can look after himself and his estate and that there is no evidence of any psychiatric illness. It is also his deposition that he is ninety-two years of age and has consistently enjoyed good health and any medication has been by prescription from his own doctors both in Kenya and in the UK.

6. It is Mr. Jagdish's believe that while this petition is guised as a matter concerning his mental health, it is indeed a claim for his properties which he avers he has gifted his children in an attempt to put his affairs in order given his advanced age. He further avers that he gifted the Petitioner the property known as 96 Millbank, Woodley Reading, Berkshire, RG5 4ER. Further, that in 2009, being willing and ready to gift the property known as Sai Kunj 50 Mahaveer Murg Ratanada Jodhpur Rajasthan, he tasked the Petitioner to subdivide the said property into three portions so that the same would be owned by all his three sons being the Petitioner and the respondents herein but to date the Petitioner has not made good his promise to subdivide the said property and effect the appropriate transfers to the 1st and 2nd respondents.

7. In addition, Mr. Jagdish avers that in June 2017 on his own volition, he transferred the suit property to the 1st and 2nd respondents herein subject to his life interest in the property and before executing the transfers, he was duly advised by counsel on the effect of the transfers which decision he made fully aware of the consequences. However, this decision did not go down well with the Petitioner and he even subjected himself to a medical examination to satisfy the Petitioner that the gift *inter vivos* made to the 1st and 2nd respondents was done willingly and with clear intent. He further avers that he has a will whose date is later in time than the will produced by the Petitioner and whose contents mirror what he has deposed above. Be that as it may, he posits that he is free to deal with this property in any way including gifting *inter vivos*.

8. It is Mr. Jagdish's averment that he provided financial assistance to the Petitioner for the purchase of the property known as 41 Tilehurst, Rood, Reading RG17TT England which consists of a shop and flats which are creating rental income for him and his family and urges that the Petitioner should return to England, his country of domicile. He therefore prays for the dismissal of the petition with costs and particularly the Petitioner's claim under the Mental Health Act and urges the Court to disregard all the references in this petition about his mental health.

9. The 1st and 2nd respondents in response filed an affidavit sworn on 5th February, 2020 by the 2nd Respondent, Mohan Singh Bhatti. He states that the entire petition and the supporting affidavit are based on falsehoods meant to hoodwink this Court into granting the prayers sought. He confirms that their father is of sound and clear mind and can make decisions on his own pertaining to all his affairs. Accordingly, they believe that the proceedings herein do not relate to their father's mental health but are intended to dispossess him of his freedom to look after himself on his own and interfere with his freedom of action and choice of lifestyle. It is therefore the respondents' case that the Petitioner's prayer to have him appointed as the guardian of Mr. Jagdish Ram Singh Bhatti is misplaced and coated with malice and falsehoods.

10. The 2nd Respondent avers that the Petitioner's claim for reinstatement to the suit property is unfounded for reasons that the Petitioner has failed to establish any legal or equitable right to the property. He further avers that the Petitioner is domiciled in England where he was gifted a six bedroom house in addition to a running business by their father. He additionally deposes that the Petitioner was given the larger part of a building on Plot No. 50, Mahaveer Marg, Ratanada, Jodhpur, Rajasthan, India and the remaining part ought to be transferred to them which promise is yet to be fulfilled.

11. According to the 2nd Respondent, the basis upon which the Petitioner is making a claim to the suit property is in regard to a will that was purportedly made by their father fifteen years ago but Section 17 of the Law of Succession Act provides that a will may be revoked or altered by the maker at any time when he is competent to dispose of free property by will. Further, that a testator to a will has the right to deal with his properties as he so wishes in his lifetime despite having made a will.

12. It is also his averment that the suit property was willfully gifted to the respondents by their father without any coercion and the Petitioner is therefore not a beneficiary of the said property as reflected in their father's subsequent will. He is also of the view that this Court does not have jurisdiction to declare the transfer of the suit property null and void as it is only the Environment and Land Court which can issue such orders. In summary, he avers that the Petitioner no longer has any legal interest over the suit property, has failed to prove their father requires protection under the Mental Health Act and has continued to cause nuisance and distress to their father and the family at large. Accordingly, they urge that the present petition is an abuse of court process and seek its dismissal with costs.

13. Dr. Komolo appearing for the Petitioner highlighted his written submissions dated 25th February, 2020. He submitted that while this Court is not being asked to determine the trust matter, the said matter operates as a background to the suit and as such, the Petitioner should be allowed back to the property to maintain the *status quo*. Be that as it may, it was his contention that the property is substantial in size and would be capable of accommodating all the parties. He supported his submissions by citing the case of **American Cynamid v Ethicon Ltd [1975] 1 All ER 504** where Lord Diplock in summary stated that the object of interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages but that claim ought to be weighed against the corresponding need of the defendant to be protected against injury.

14. It was further the submission of counsel that the Petitioner does not have to establish that he will succeed in the main action and only needs to show that he has a reasonable prospect of doing so. Counsel cited the case of **Lloyds Banks v Rosset [1991] 1 AC 107** for that proposition. He also relied on the case of **Riccardo Nelson Pasotto v Carlo Barbin Lissone [2017] eKLR** for the proposition that a constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.

15. Regarding the guardianship of Mr. Jagdish, counsel for the Petitioner cited sections 2, 26 and 28 of the Mental Health Act and submitted that Mr. Jagdish has an impaired memory and has not been fit to deal with any important matter for more than four years as evidenced by an exhibited email dated 29th September, 2015. Accordingly, he argued that the business affairs of Mr. Jagdish are being mismanaged by the respondents influencing him to make adverse and wrong decisions. Counsel therefore sought that his client be reinstated to the suit property and appointed the guardian of Mr. Jagdish.

16. Ms. Ngugi holding brief for Mr. Gachoka appearing for Mr. Jagdish highlighted their written submissions dated 28th February, 2020. On the issue whether the application for guardianship was merited, counsel relied on Section 26 of the Mental Health Act and submitted that a person who is to be the subject of such an order for guardianship is one who is suffering from a mental disorder and the medical report produced herein proves otherwise. Therefore the allegations made by the Petitioner on memory loss are unsubstantiated and false and for that reason the petition ought to be dismissed with costs.

17. Regarding the issue whether the transfer of the suit property should be voided by this Court, counsel submitted that the affidavit sworn by Mr. Jagdish clearly states that the suit property was gifted to the respondents voluntarily. Counsel pointed out that the Petitioner does indeed enjoy the privilege of being the owner of 96 Milibank Crescent, Woodley Reading, Berkshire, RG5 4ER to the exclusion of any of the respondents. According to Mr. Jagdish's counsel, gifts are not an entitlement.

18. On the alleged mental illness of Mr. Jagdish, counsel cited the case of **Grace Wanjiru Munyinyi & Anor v Gedion Waweru Githunguri & 5 others (2011) eKLR** where it was held that the law presumes that every person is mentally sound unless and until he is proved to be mentally disordered and even where a person is shown to be of unsound mind, one must always bear in mind that the degrees of mental disorder are widely variable and incompetence to do any legal act or inability to protect one's own interest, must not be inferred from a mere name assigned to the malady from which a person may be suffering. It is therefore counsel's position that old age is insufficient in holding the subject mentally incapable.

19. Counsel also relied on the case of **In the Matter of Gerishom Kamau Kirima [2009] eKLR** which crystalizes the necessity of proof by a petitioner to show *prima facie* that the person against whom the orders are sought is a person suffering from mental disorder so as to be incapable of dealing with the ordinary demands of life and the order sought is for the welfare of the person concerned. Counsel therefore submitted that the Petitioner has not brought any medical reports proving the subject's mental capacity. Counsel also cited the Indian case of **Balakrishnan v Balachandran [1956] 1 MLJ 459** where it was observed that to ensure that no man is adjudged a lunatic without proper enquiry, the court should hold a judicial inquiry that consists of questioning the lunatic by the Judge himself in open court or in chambers in order to see whether he is really a lunatic and of unsound mind.

20. Regarding the gift *inter vivos*, Mr. Jagdish's counsel submitted that the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of declaration of trust by the donor, or by way of resulting trust or the presumption of gifts and must be by way of registered transfer, or if the land is not registered it must be in writing or by declaration of trust in writing. Counsel asserted that gifts *inter vivos* must be complete for the same to be valid as was held in **Re Estate of the Late Gedion Manthi Nzioka (Deceased) (2015) eKLR**. He therefore urged that the transfer of the suit property was duly transferred as per the provisions of the law.

21. Lastly, counsel cited **Halsburys Law of England 4th Edition Volume 20(1) at paragraph 67** where it is stated that where a gift rests merely on promise, whether written or oral, or in an unfulfilled intention, it is incomplete and imperfect and the court will not compel the intending donor or those claiming under him to complete and perfect it, however, a promise made by deed is binding even though it is made without consideration. The Court is therefore urged to dismiss the petition with costs.

22. Ms. Njoroge appearing for the respondents highlighted the written submissions dated 28th February, 2020. On the issue whether the subject should be declared as suffering from a mental disorder, counsel submitted that Mr. Jagdish in his affidavit annexed a medical report by Dr. Max Okonji who was of the opinion that the subject is in good physical health and had no evidence of psychiatric disorder. Further, that another medical report by Dr. Khusal Singh annexed to the subject's affidavit confirms that the subject was under his medical care and was in good physical and mental health. For that reason, counsel argued that the Petitioner should not be appointed the guardian to the subject or the manager of his estate.

23. On the issue whether this Court has jurisdiction to declare the transfer of the suit property void, counsel submitted that pursuant to Article 162 of the Constitution as read with Section 4 of the Environment and Land Court Act, 2011, only the Environment and Land Court, and not this Court, has jurisdiction to hear any dispute relating to environment and land. Be that as it may, counsel submitted that no evidence has been adduced by the Petitioner before this Court that the impugned transfer was procured by under influence over Mr. Jagdish.

24. On whether the Petitioner should return to the suit property, counsel submitted that there was no promise or agreement made by their

father to the Petitioner or the respondents which makes him contractually bound to transfer property to any of them. Further, that the **American Cyanide** case cited by the Petitioner does not apply to the present case, the Petitioner having failed to prove his right to the suit property and as such, should not be reinstated back on the suit property.

25. On the question of constructive trusts and promissory estoppel, counsel submitted that there is no interest by the Petitioner in the property held by their father freely and exclusively in his own name and disposed of at his will. Counsel cited the case of **Twalib Hatayan & another v Said Saggah Ahmed Al-Heidy & others [2015] eKLR** where the Court examined the law on trusts and held that unlike constructive trusts where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. The Court further held that most importantly, the general rule is that a resulting trust will automatically arise in favour of the person who advances the purchase money. In view of the above, counsel submitted that the Petitioner had no legal or equitable interest on the property neither has he established or referred to any conduct of any of the parties which is necessary to establish any kind of trust, constructive or otherwise. The question of trust therefore does not arise in his view. In conclusion, counsel urged the Court to dismiss the petition with costs.

26. Having considered the petition, the responses thereto, submissions by counsel for the parties and authorities relied on, I am of the view that the issue for determination is whether the instant petition is properly before this Court and if so, whether it has merit.

27. The Petitioner wants this Court to intrude into the affairs of Mr. Jagdish on the grounds that he is mentally ill and unable to manage his affairs and particularly in respect to the suit property. The Petitioner has exhibited medical reports dating back to 1997 indicating that his father was suffering from extensive degenerative changes in his cervical spine which in his view amounts to a mental disorder. A person suffering from a mental disorder as defined by Section 2 of the Mental Health Act, Cap. 248 is a person who has been found to be so suffering under the Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.

28. The Petitioner's evidence is countered by the subject himself who has produced medical reports from two independent doctors one being a consultant physician and the other a consultant psychiatrist who confirm that he is in a good physical state with no evidence of psychiatric disorder. In the case of **Nairobi HC Election Petition No. 36 of 2009, In the Matter of the Mental Health Act Cap 248 of the Laws of Kenya and In the Matter of Gerishom Kamau Kirima**, Kalpana Rawal, J (as she then was) made the following observation when confronted with an application under the Mental Health Act:-

“In view of the aforesaid observations made, I do tend to agree that the Petitioner while bringing in a petition for orders under Section 26 of the Act, has to show to the court, by providing medical reports to substantiate the averments made in the Petition. The Petitioner, when he comes before the Court, has to show prima facie that the person against whom the orders are sought is a person suffering from mental disorder so as to be incapable of coping with the ordinary demands of life and the orders sought is for welfare of the person concerned.

This satisfaction by the court has to be based on the medical reports annexed to the petition. I humbly thus agree that the court, as per the provisions of the Act, has no jurisdiction to enter into an arena of dispute so as to assist either party to substantiate their respective claims.

As per general practice evolved, the petition under Section 26 of the Act is made ex-parte and I do find that the court shall be very wary of making an order which can go to the extent of deprivation of a person's liberty and property. I hope this precedent shall embalm a principle of safeguarding the rights of persons whatever their status in the society.”

29. In view of the evidence placed before the Court by the parties, it becomes obvious that apart from the fact that Mr. Jagdish is a senior citizen, he is a person who is mentally fit. Attempts by his counsel to have him testify before this Court were rebuffed by the Petitioner's counsel for obvious reasons. It is only the evidence of an expert that can truly guide the Court in arriving at the determination as to the mental capacity of a person. The medical evidence adduced by the parties tend to confirm that the subject is mentally sound.

30. Counsel for the Petitioner attempted to impugn the evidence of Dr. Singh on the ground that he is a family friend. I do not see how a relationship between a doctor and a patient can impair the judgement of the doctor. It was not demonstrated that the said doctor is angling to reap fruits of his patient's investments. In any case, there was no iota of evidence to show that Dr. Okonji, a specialist in mental health had reason to doctor (pardon the pun) his medical report. I therefore dismiss the assertions by the Petitioner that the subject is mentally ill and incapable of managing his affairs.

31. It is on the basis of the purported mental illness of Mr. Jagdish that the Petitioner applies for his guardianship and further claims that he has been thrown out of the suit property by the respondents who are now the registered owners. The subject on the other hand deposed that he gifted the respondents with the suit property just as he gifted the Petitioner with property in England which fact is not contested. It is not the duty of the Court to question the affairs of Mr. Jagdish. Matters of love and affection within a normal family setting should not be subjected to the jurisdiction of the Court. Children should honour and respect their parents so that the parents can look upon them favourably when putting their affairs in order as they prepare to exit the stage. From the evidence placed before this Court it can be discerned that Mr. Jagdish is a good father who has taken care of each of his sons. If this was a succession cause, I would have been keen to find out what he has done for his daughters. However, that is not an issue for the Court's determination.

32. What then does the law require with respect to a gift *inter vivos*? In her decision in **Re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] eKLR**, the Court stated as follows:-

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

33. The Judge further relied on **Halsbury’s Laws of England 4th Edition Volume 20(1) at paragraph 67** where it is stated with respect to incomplete gifts as follows:-

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

34. The Petitioner is challenging the validity of the transfer of the suit property to the respondents and that transfer has already been validly completed by the owner who had the mental capacity to do so. His challenge is indeed without merit.

35. It is important to note that even though the Petitioner disguised this petition as raising constitutional issues, he is in my view simply contesting the decision of his father to distribute his properties among his children. He relies on a will previously made by his father but fails to appreciate that Section 17 of the Law of Succession Act, Cap. 160 provides that a will may be revoked or altered by the maker at any time when he is competent to dispose of his free property by will. In any case, a will is not for implementation by the court during the lifetime of the maker. It can only aid in the distribution of the estate of a deceased person. As already stated, this Court cannot compel the Petitioner’s father to distribute his wealth in a given manner. If the subject chose to gift the respondents, it was within his right to distribute his property as he pleased.

36. Although this matter did not raise any constitutional issue meriting the attention of the Constitutional and Human Rights Division and ought to have been filed in the Family Division, I have nevertheless dealt with the matter substantively so as to obviate the need for the parties to re-litigate the matter before another Judge of the High Court. Having found the subject of the proceedings, Mr. Jagdish, to be mentally fit to manage his affairs and properties, I find and hold that this petition is not merited and I therefore dismiss it. In order to give the parties an opportunity to come back together as one family, I will not award costs against the Petitioner. The petition is therefore dismissed and each party will meet own costs of the proceedings.

Dated, signed and delivered through video conferencing/email at Nairobi this 28th day of May, 2020.

W. Korir,

Judge of the High Court