



Aziz v Land Registrar, Mombasa & another (Environment and Land Civil Miscellaneous Application 13 of 2020) [2023] KEELC 22113 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22113 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 13 OF 2020
SM KIBUNJA, J
DECEMBER 13, 2023

BETWEEN

HASSAN ABDULKADIR AZIZ APPLICANT

AND

LAND REGISTRAR, MOMBASA 1ST RESPONDENT

ALI BIN MOHAMED 2ND RESPONDENT

RULING

1. The applicant commenced this proceeding through the notice of motion dated the 19th June 2020 seeking for inter alia:
 - a. That the court grant an order to advertise the loss of the original title deed and transfer instrument in regard to Plot No. 966 (original No. 205/1) Section 1 Mainland North, Mombasa.
 - b. That the court grant an order to invite Ali Bin Mohamed or his lawful representatives through advertisement in a reputable newspaper publication with a wide coverage to come forward and execute fresh set of transfer instrument in favour of the applicant.
 - c. That the court to grant an order that if the transferors or their respective lawful representatives fails to respond to the advertisement ordered herein above, the Chief Land Registrar to effect the issuance of 'Provisional Certificate of Title' in favour of the applicant.
 - d. The costs be in the cause.

The application is premised on the two (2) grounds on its face and supported by the affidavit Hassan Abduikadir Asiz sworn on the 19th June 2020 deposing among others that the suit property was registered in the name of Ahmed Bin Mohamed Nasib, deceased, and was distributed by the Chief Kadhi on 30th January 2008 in Mombasa Kadhi Succession Case No. 38 of 2003; that the applicant



approached the Land Registrar on 5th June 2020 to be issued with a ‘Provisional Certificate of Title’ but was directed to obtain the consent of Ali Bin Mohamed who owns 1/13 share of the 13.19 acres suit land; that he has been unable to trace the said Ali Bin Mohamed and the original title is lost and cannot be traced and hence this application.

2. The application is opposed by the 1st respondent through the replying affidavit sworn by Mercy Chepkemoi, Land Registrar Mombasa, sworn on the 31st May 2023 deposing inter alia that the suit property was to be shared in accordance with the Chief Kadhi’s order of 30th January 2008, and the decree filed by the applicant dated the 13th September 2012; that pursuant to the said order various entries transferring ownership to the various beneficiaries were effected on the certificate of title of the suit property; that the said entries occasioned the subdivision of the suit property, and issuance of several new certificates of title to the beneficiaries in respect of their shares of the estate; that as is the common practise where a property has been subdivided, the original certificate of title is closed and the orders sought by the applicant for provisional certificate of title cannot be issued, as to do so would affect the interests of the other bona fide holders of valid certificates of title in respect of the subdivisions from therefrom; that the applicant has served the Land Registrar’s office with an ambiguous and suspicious order by Principal Kadhi Hon. Salim Vumbi dated 30th November 2022 over the entire suit land which has already been subdivided; that the applicant has not met the threshold required for the orders sought to issue and the application should be dismissed with costs.
3. The applicant filed a supplementary affidavit sworn on the 6th July 2023 disputing that the certificates of title over subdivisions of the suit property have been issued apart from that issued to Mr. Juma Maftah for title CR. 20958 as confirmed at entry 25. That the mother title is only closed after all subdivisions are registered and titles thereof issued. That the fact that the Land Registrar filed a restriction against the title of the suit property on the 10th July 2019 is evidence the title has not been closed. That the restriction should be lifted and that the Kadhi’s order of 30th November 2022 is still valid. That the deceased, whose estate he administers, had transferred the portion of the suit land he had sold to Juma Maftah during his lifetime. That he however died before transferring portions to S. R. Bleazard, Kazungu Ngala and the portion required for public access road to the County Government of Mombasa, and that responsibility is now his as the administrator of the estate before the original title can be closed.
4. The learned counsel for the applicant and the respondent filed their submissions dated the 3rd October 2023 and 13th October 2023 respectively which the court has considered.
5. The following are the issues for the court’s determinations:
 - a. Whether the applicant has made a reasonable case for the loss of the title deed, and execution of the transfer instrument to be advertised.
 - a. Whether the court should issue an order for Ali Bin Mohamed or his lawful representatives execute fresh set of transfer instrument and in default the Chief Land Registrar be ordered to issue the ‘Provisional Certificate of Title’ in favour of the applicant.
 - b. Who pays the costs in this application?
6. The court has considered the grounds on the application. affidavit evidence by both parties, submissions by the learned counsel, superior courts decisions cited thereon and come to the following conclusions:



- a. This matter is about a piece of land known as plot No. 966 Section I Mainland North, Mtopanga in Kisauni Constituency, measuring 13.19 acres, suit property. The annexed copy of the certificate of ownership marked ‘HAA3’ at entries numbers 17 and 18 is noted the transfer of 1/13th to Ali Bin Mohamed and 12/13th to Ahmed Mohamed Bin Nasib respectively. Ali Bin Mohamed is the 2nd respondent in this proceeding and Ahmed Mohamed Bin Nasib is the deceased whose estate the applicant herein represents.
- b. The decree issued on 13th September 2012 by Hon. Chief Kadhi Sheikh Hammad M. Kassim in Kadhi Court Succession No. 38 of 2023 marked ‘HAA1’ indicates the petitioner as Abdulkadir Hassan Abdulaziz. It directed on how the estate of Ahmed Mohamed Nasib and Aisha Said Nasib was to be inherited/distributed. As can be seen at paragraphs (3) and (6) of the decree, the estate included “966/1/MN” which I take to be the suit property herein.
- c. That the closing of the register of the subdivided parcel and opening of new registers of the subdivisions thereof is provided for under section 22 (2) of the Land Registration Act No. 3 of 2012. The Land Registrar has general powers under section 14 of the said Act to inter alia;
 - “c. refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.”

The court has the power of review of the Land Registrar’s decisions under section 86x(1) of the said Act that provides:

“86.

- (1) If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties.”

Having considered the affidavit evidence presented by the applicant and the 1st respondent, I agree with the state that no evidence has been brought to this court to show that the applicant has made any application for replacement of the certificate of ownership or title of the suit property and as such the court finds the application is premature.

- d. The doctrine of exhaustion as submitted by the learned counsel for the 1st respondent is fundamental in the development of justice and avoids unnecessary backlogs in the courts of law, especially the Environment and Land Court. In the Court of Appeal case of Geoffrey Muthinja & another versus Samuel Muguna Henry & 1756 others [2015] eKLR the court observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his



own interest within the mechanisms in place for resolution outside of courts. This accords with article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

There being nothing to show attempts at applying for lost title or certificate, I am inclined to decline prayer 2 in the instant application.

- e. The court has perused the pleadings and other processes filed in this proceeding and there is nothing to confirm that the 2nd respondent was ever served with the suit papers at any time. The two affidavits of service on the record by Dominic Munguti Kitika sworn on 13th October 2020 and 25th October 2020 and filed on the 13th October 2020 and 29th January 2021 respectively were both on the service done on the office of the Attorney General. The 2nd respondent has the right under *the Constitution* to be heard before orders touching on his proprietary interests over the suit property can be considered and or issued. No such order can be issued without giving him an opportunity to be heard in accordance with the law and *the Constitution*.
- f. Under section 5 of the *Kadhi's Court Act*, the Kadhi court has jurisdiction to listen to inheritance matters if all parties profess the Muslim faith and all procedures are regulated by the Kadhi's Court order of 1977. The applicant has annexed a copy of the decree and a certificate of title marked as HAA 1 and HAA 3 respectively. The title shows that 1/13th of the suit property belongs to the 2nd Respondent while 12/13th belongs to the estate of the late Ahmed Mohamed Bin Nasib. The decree categorically states as follows:

“ Claims For:

1. Inheritance of the estates of Ahmed Mohamed Nasib And Aisha Said Nasib.

This matter coming up for hearing before the Honourable Chief Kadhi Sheikh Hammad M. Kassim, before the Counsel for the Plaintiff and Counsel for the Defendant, It is hereby ordered:-

1.
2.
3. That, all the properties under the names of the deceased Ahmed Mohamed Nasib Or Aisha Said Nasib be distributed as above. These are Plot No. 842/II/M.N. and Plot No. 966/I/M.N.
4.
5.
6. That, Plots 842/1/MN, 966/I/MN and 258/11/MN be inherited by the beneficiaries, male getting twice that of the female.”

There is no doubt from the decree that the distribution was only in relation to the estate of Ahmed Mohamed Bin Nasib to the exclusion of that of the 2nd Respondent. The 3rd prayer in the instant application has the effect of asking the court to enforce orders not given by the learned Hon. Chief Kadhi in the order of 13th September 2012, and cannot be granted.



- g. That Succession Case No. 38 of 2003 before the learned Hon. Chief Kadhi was not a succession proceeding over the estate of the 2nd respondent. It is not lost upon this court that after the decree was issued on 13th September 2012, a vesting order annexed to the replying affidavit and marked 'MK3' was granted by Principal Kadhi Hon. Habib Salim Vumbi that was issued on 30th November 2022. It states that the applicant was the administrator of the estate of the late Ahmed Mohamed Bin Nasib.
- h. The court cannot enforce or review orders as per section 86 of the [Land Registration Act](#) as no such orders exist. I therefore also decline to grant prayers 3 and 4.
- i. That as the applicant has failed in all the prayers on his application, then under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, he shall pay the 1st respondent's costs.
7. Flowing from the above, the court finds and orders as follows:
- a. That the Applicant's notice of motion dated the 19th June 2020 is without merit and is hereby dismissed.
- b. The Applicant to pay the 1st respondent's costs.
- It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 13TH DAY OF DECEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Applicant : Mr. Tindi.

Respondents : Mr. Kemei For 1st Respondent.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

