



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 198 OF 2013

SOUD ABDALLA LASSIE

(Suing on behalf of the Estate of the late Lassie Bin Abdulla).....PLAINTIFF

VERSUS

FATMA KHAMIS JENEBY.....1ST DEFENDANT

THE LAND REGISTRAR, MOMBASA.....2ND DEFENDANT

ROQAYA ABDALLA LASSIE.....3RD DEFENDANT

LASSIE ABDALLA LASSIE.....4TH DEFENDANT

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced through a plaint filed on 6 September 2013. The plaintiff has filed suit on behalf of the estate of Lassie Bin Abdulla (the deceased). He has pleaded that the deceased purchased a house without land from one Sheikh Omar bin Abdulla Basharahil on 9 December 1952, for Kshs. 5,500/=, which house was standing on a portion of the Plot No. 251/XVI. This Plot NO. 251/XVI was owned by Mamjee Alibhai Noorbhai and brothers. Where the house stood was subsequently identified as Plot No.113 and now registered as Mombasa/Block XVI/509 (the suit land). It is pleaded that the deceased resided on the property together with his wife and eight children until he passed away on 4 December 1986. It is pleaded that through a letter dated 14 April 1987, the owners of the land offered to sell the land, where there were houses, to the tenants, at the price of Kshs. 15,000/=. The plaintiff has pleaded that he together with his siblings, Shamsa Lassie, Salma Lassie, Hashim Lassie, and Abdalla Lassie (Abdalla, now also deceased) contributed the sum of Kshs. 15,000/= to pay the land owner. Abdalla opted to use his own personal cheque to make the payment. It is pleaded that a receipt for this amount was issued on 4 November 1987 in the name of their deceased father, Lassie Bin Abdulla. It is the pleading of the plaintiff that at no time did the property become that of Abdalla. It thus surprised him that the 1st defendant, wife of Abdalla, filed a succession cause for the estate of Abdalla, and included the suit land as one belonging to Abdalla. The plaintiff pleads that title to the suit land was already in the name of the 1st defendant and her children (3rd and 4th defendants) when the succession cause was filed. He alleges that the 1st defendant's registration was thus fraudulent. The following particulars of fraud are pleaded :-

- a. There is no transfer, transmission or any other conveyance showing how the property changed ownership from Lassie Bin Abdulla to Abdalla Lassie.
- b. The land owners did not sign any transfer transferring the suit property to Abdalla Lassie.
- c. The transfer which allegedly transferred the suit property to the 1st defendant and her children is not dated and it is not signed by the transferor.
- d. The transfer that allegedly transferred the property to the 1st defendant offends Section 34 of the Advocates Act.
- e. The title deed was issued one year before the transfer was presented for registration.
- f. The 1st defendant did not pay any purchase price to the original owners of the suit property.

g. There was no conveyance showing change of ownership from original owners to the late Lassie Bin Abdulla, then to the late Abdalla Lassie and finally to the 1st defendant and her children.

h. There are no administrators to the estates of both Lassie Bin Abdulla and Abdalla Lassie.

i. Without an administrator to the estate of Lassie Bin Abdulla, there is no way the suit property could have changed hands.

j. No stamp duty was paid on registration.

2. The plaintiff further alleges that the 1st defendant was able to have the suit property registered in her name because, at the time, she was an employee at the Lands Registry, Mombasa. It is the contention of the plaintiff that this is family property and that he and his siblings are the beneficiaries. In the suit, the plaintiff basically seeks orders to have the title of the 1st defendant cancelled and to have declared that the property belongs to Lassie Bin Abdulla. He also wants damages and interest against the defendants and costs of the suit.

3. The 1st defendant filed defence. She admitted that her deceased father in law bought house without land on the suit property but denied that he lived there with his family. She pleaded that he resided in Nairobi all his life with his family. She averred that she got married to Abdalla in 1995 and she found the entire family living in Nairobi where they still live, including the plaintiff. She pleaded that the suit property was purchased by her late husband. She denied the averments in the plaint that the family contributed to the purchase of the land and gave her late husband the money to purchase it on behalf of the family. She asserted that her husband solely bought the suit land without any contribution from the family as no other family member was interested in purchasing it. She averred that at the time her husband bought the land the house that her father in law had purchased had been abandoned and had fallen down. She pleaded that had there been any issue, the plaintiff would have brought it up before her husband died in 2007. She pleaded that her husband secured building approval in his name and commenced construction of a three storey building in the presence of everybody and the plaintiff did not stop him. Her husband however died before he could complete the building but had done the ground floor. She pleaded that immediately after the death of her husband, the plaintiff came to Mombasa and put his step-brother, one Bardrin Mamdim, in possession of the premises claiming that he had nowhere to live. She pleaded that the inclusion of the property in the succession matter was not her idea but that of her erstwhile counsel and it was done without the implications being explained to her. She pleaded that the property is registered in her name as guardian to her children. She averred that the property was lawfully acquired and denied the allegations of fraud.

4. The 3rd and 4th defendants filed a joint defence. They are the children of the 1st defendant. They more or less made pleadings in line with those of the 1st defendant. They denied the allegation that the family contributed money to purchase the property and reiterated that it was solely purchased by their late father. Nothing was filed by the 2nd defendant, the Land Registrar, Mombasa.

A. Evidence of the Parties

5. PW-1 was the plaintiff. He testified that he lives and works in Nairobi. He gave the history of the disputed land as pleaded in the plaint. He testified that his late father purchased the house in the year 1953 and he produced the transfer in his favour. He testified that his father was living in Mombasa but moved to Nairobi with the whole family and the house was left to his grandmother on his mother's side. His father died in 1986, and in 1987, his brothers called saying that the land where the house was located was on sale. He produced a letter dated 14 April 1987 from the agents of the owners of the land addressed to all tenants offering them the chance to buy the land. Abdalla called the whole family and asked everyone to chip in. They were three brothers and five sisters. He testified that he, and two of his sisters, Salma and Shamsa, contributed the money and they gave it to their mother who was in Nairobi. He stated that she then travelled to Mombasa, where Abdalla resided, and gave the money to Abdalla. He testified that Abdalla received the money then proceeded to write his own personal cheque of Kshs. 15,500/=, in his view, so as to have proof of payment. A receipt dated 4 November 1987 was issued in the name of their late father. At that time his father was already deceased. They did not file any case for the administration of the estate of his late father. He mentioned that there was a brother of his living in the house for some time but he shifted. He stated that he was later shocked to see that there is a title deed in the name of the 1st defendant holding it in trust for herself and her children. The title was issued on 13 November 2009. He stated that at no time did his late father transfer the property to Abdalla and neither did the original owners of the land transfer it to him. He added that the title deed was issued one year before the transfer was presented for registration and that it offended Section 34 of the Advocates Act, and further that no stamp duty was paid.

6. Cross-examined, he testified that his mother is also deceased, having died about the year 2015 after the case had been filed. Abdalla died in the year 2007. He stated that he was born in Nairobi and so too the rest of his siblings. He conceded that despite the pleadings saying so, they were not born in the disputed land and he never lived in it. He stated that his brother worked for KENATCO and when it went down, he came to live in Mombasa. The house had been let out to tenants and it was his grandmother who was collecting rent. He stated that she is now deceased having died about 20 years ago. After her demise, his brother in law, who is married to his step-sister, started collecting the rent. He handled this until Abdalla moved into the house. He testified that previously, what existed was a Swahili house, but now there is a proposed flat with the ground floor completed, which was built by Abdalla. He acknowledged that it was Abdalla who applied to develop it. Cross-examined on the alleged contribution that he stated they made to buy the land, he reiterated that it was him and his two sisters who contributed towards the purchase. He testified that Abdalla did not make any contribution as he did not have a steady job. He was not aware that the 1st defendant had paid stamp duty and lawyer's fees of Kshs. 82,177/=. He acknowledged that his late father's interest was the house without land and that the house was demolished. He also acknowledged that at no time was the land registered in the name of his late father, since at the time he died, the land had not been bought. He did not however agree that his father's interest disappeared with the demolition of the house. He stated that at the moment, it was his sister, Salma, who is in charge of the development on the suit property.

7. Re-examined, he testified that though dead, when the property was sold, it was his father who was still tenant, and that is why the receipt was issued in his name. He acknowledged that it was the 1st defendant and her family who lived in the house before they moved to Kilifi.

8. PW-2 was Shamsa Lassie Abdalla. She lives in Nairobi and is a retired accountant. She testified that their late father never bequeathed the house to anybody. At the time he died, he owned the house, but not the land. It was after he died that the owner of the land decided to sell.

She testified that Abdalla was in Mombasa while the rest of the siblings were in Nairobi. He informed them that the land was on sale and asked if they could buy it. She testified that she, the plaintiff, Salma, and Hashim Lassie, her brother, are the ones who contributed. They gave the money to their mother who delivered it to Abdalla in Mombasa and Abdalla paid it. She did not know why he used his personal cheque. She stated that her father left a Swahili house but this is not what is there now. She added that they used to send money to Abdalla to develop a new house. She could not remember when the redevelopment was done, as, in her words, it was now a long time ago. She added that after the renovations, her step-brother, Badruddin, lived here. He died about 4-5 years ago. He was occupying some rooms and others were let out to tenants. She didn't know who was in occupation of the house as it is her sister Salma who follows it up.

9. Cross-examined, she acknowledged that what is now developed is a stone built structure with a roof and not a Swahili house. She asserted that she contributed to the renovations but she did not remember how. Pressed, she stated that she contributed some "mabati" which she had asked for from her brother's (Hashim) mother in law, who gave them to her without charge.

10. Questioned by the court, she stated that she does not receive any share of rent. It is now Salma who collects the rent and she did not know if she keeps it.

11. With the above evidence, the plaintiff closed his case.

12. DW-1 was the first defendant. She is an administrative assistant in the Ministry of Lands, in the Adjudication department. She relied on a witness statement which more or less repeated what she pleaded in the defence. She testified that she did file a succession case in respect of her late husband's estate but she withdrew it. She produced the cheque that her husband wrote for the sum of Kshs. 15,000/= purchasing the disputed land and the letter that forwarded the said cheque. The letter is dated 30 October 1987. She also had a letter dated 9 March 1992 whereby her late husband had inquired from the District Land Registrar about issuance of the title to him. She testified that in none of the letters did her late husband state that the land was being bought on behalf of other people. She stated that after her husband died, she went through his documents, after which she went to the agent who was selling the land. She was sent to the law firm of Pandya & Talati who gave her a breakdown of what she was supposed to pay in order to obtain a transfer. It was the sum of Kshs. 82,177/= which she paid. She also paid all accumulated rates from the year 1994 totalling Kshs. 113,724/=. Her husband had obtained building approvals for the development.

13. Cross-examined, she acknowledged that the land was offered for sale to the tenants. She reiterated that it was her husband who paid but the receipt was issued in his father's name because it was him who was the tenant. At that time he was already deceased. Abdalla did not complain about this receipt and the anomaly in the receipt was not corrected. He however wrote to be issued with title in his name. There was no sale agreement that was written between her husband and the land owner. She testified that the amount of Kshs. 82,177/= included stamp duty which the advocates paid. She never asked them for the stamp duty receipt. Title was issued on 13 November 2009. She got title before filing for succession. She stated that her advocates advised that it is more prudent if title came in her name, rather than her late husband's, because for the latter, it would need another transfer. She took the first option and thus held the title in trust for the children. A transfer was done by the seller. It bore the date 13 November 2009. All the conveyance was done by M/s Pandya & Talati Advocates. She filed succession to have the estate of her late husband distributed and listed the suit property alongside others. Though she works at the Ministry of Lands, she is not conversant with how registration of titles is done. She did not know what is going on with the property as she claimed that her brothers and sisters in law told her not to step there. It was her late husband who built the house in 1996 and he died before he could complete it.

14. DW-2 was Lassie Abdalla Lassie, the son of the 1st defendant. He was 23 years old when he testified. He more or less aligned himself with the evidence of DW-1.

15. With the above evidence, the defence closed its case.

16. Counsel thereafter filed submissions.

B. Submissions of Counsel

17. In his submissions, Mr. Wachira King'ang'ai, learned counsel for the plaintiff, submitted that the suit property forms part of the estate of Lassie Bin Abdulla (deceased). He referred to the evidence of the plaintiff that they contributed money for the purchase of the land and handed it to Abdalla who then paid using his cheque. He submitted that at the time Abdalla died in the year 2007, title to the suit land had not been issued. He observed that the receipt was issued in the name of the tenant. He submitted that in absence of a sale agreement, transfer or receipt showing that Abdalla had changed ownership of the plot to himself before his death, then the plot formed part of the estate of the deceased. He submitted that there is no adequate proof that Abdalla paid the purchase price and that it is not indicated whether the cheque used was a personal cheque or banker's cheque as no copy was available. He submitted that the letter of 30 October 1987 shows a desperate attempt to have the receipt issued in his name and that he was aware that the plot belonged to his father. He submitted that this is buttressed by the part of the letter asking for a power of attorney. He submitted that Abdalla never notified his siblings that he has used his personal or banker's cheque to pay for the plot. He referred to the evidence of the plaintiff that they chipped in the re-development of the property as Abdalla was out of employment. He submitted that the evidence of the defendants does not show that Abdalla notified his siblings that he had intentions of having the property declared his own and the siblings were not aware that he had drawn up building plans. He submitted that they only came to be aware when it was revealed in the succession matter that there was a title. He submitted that the procedure required in registering and obtaining title was not followed. He urged that there was no proof of payment of stamp duty and that title was not first registered in the name of Abdalla. He also submitted that there was no proof of the transfer; that the transfer is drawn by an advocate not mentioned anywhere as acting for either party; that the transfer offends Section 34 of the Advocates Act as the mentioned advocate was not an advocate at the time; that no purchase price was paid to the original owners of the property; that there is no conveyance to the deceased then to Abdalla and finally to the 1st defendant; that there are no administrators of both the deceased and Abdalla; that the 1st defendant admitted that she did not follow the procedure so as to save on costs. He submitted that the title deed is therefore not valid and should be cancelled. He submitted that what the defendants are entitled to is their inheritance as beneficiaries of the deceased.

18. On his part, Mr. B.O Odongo, learned counsel for the defendants, submitted that the suit land does not form part of the estate of Lassie Bin Abdulla. He submitted that what Bin Abdulla owned was a house without land and that this house fell down a long time back and is no longer in existence. He referred me to various authorities which elaborate on the concept of house without land. He was of opinion that it can be described as a chattel within the meaning of the Chattels Transfer Act, Cap 28. He submitted that had the house been there when Bin Abdulla died, then it would have formed part of his estate and not the land where it stood. He submitted that the issuance of the receipt in the name of the deceased could not make the subject land the property of the deceased. He added that if the purchase was through contribution, then the interest would be that of co-owners, but not that the property would form part of the estate of their deceased father. He submitted that the property cannot be part of the estate by virtue of the succession cause filed by the 1st defendant, as what one did not own during his lifetime cannot be his after his death. He relied on the maxim *mors ultima linea rerum est* – that death is the closing limit of human transactions. He submitted that the siblings of the plaintiff do not have any right in the property. He submitted that there was proof that Abdalla was buying the land for himself and was of opinion that the letters he wrote give a clear testimony. He added that the plaintiff in his pleadings claimed that the family was born and raised in the subject house which did not turn out to be the case when they testified. He did not think that there was any truth in the plaintiff's story. He also wondered why the plaintiff and his siblings never followed up on the issue until Abdalla died. He submitted that the way the plaintiff handled the matter is not consistent with that of a person who has spent his money towards purchase of property. He rubbished the accusations against the counsel mentioned in the transfer instruments. He also questioned the capacity of the plaintiff pointing out that the grant of letters of administration he produced was for a person who died on 4 December 2013 yet Lassie Bin Abdulla died on 4 December 1986. He thought that the grant is in respect of a completely different estate with a similar name.

C. Analysis and Final Orders

19. It will be seen that the facts of the case are largely not in dispute, the bone of contention only being whether the late Abdalla purchased the suit land for himself or on behalf of the family. The evidence will show that the late Lassie Bin Abdulla (deceased) purchased, on 9 December 1952, a house without land from one Sheikh Omar bin Abdull Basharahil. This was a Swahili house. Despite the plaintiff in his plaint contending that the deceased resided in the property together with his wife and eight children and that the children left the house as they grew and matured, that is not true. The evidence, even that of the plaintiff himself, confirms that the deceased lived in Nairobi with his family and not in the house that he purchased. It is not very clear what was going on in the house but this is not material to our case. What is material is that the land where the house stood was offered for sale through an offer letter dated 14 April 1987 written by Fourways Accommodation Bureau acting as agents of the land owners. This was a general letter, not addressed to any particular person, but "to all the tenants." At the time the letter was written, Bin Abdulla had died, having passed on, on 4 December 1986. I am not sure whether at the time the letter of offer was written, the land owners knew that Bin Abdulla had died, but it is trite that an offer cannot be accepted by a dead person. It follows that the offer to purchase could only be accepted by the persons who were alive. The plaintiff contends that they jointly contributed towards the purchase of the land and that they were purchasing it for the estate of the late Bin Abdulla. This aspect of the case is critical and I will give it some depth in analysis.

20. The evidence adduced by the plaintiff (as PW-1) was that the contribution was made by himself, and his two sisters, Salma and Shamsa. These would be three persons. Shamsa (PW-2), testified that the contribution was made by four persons, that is herself, Salma, the plaintiff and Hashim. The evidence here is of course not in tandem. Neither is it in line with the plaint which mentions Abdalla as among those who contributed. Apart from this oral evidence, there is nothing supporting this claim that the purchase price was contributed by the persons mentioned, forget for a moment that the evidence is not on all fours. There is no letter or other document forwarding to Abdalla the money, and there is no letter of acknowledgment from Abdalla. There is no note and there is no voucher. One may state that since the parties were siblings, then probably they needn't have done anything formal. But there is not even any mention of this transaction in an informal letter between siblings, which was common in the 1980s, for we did not then have mobile phones, emails, and the gadgets that we currently use. You would expect that there be something mentioning this important transaction, if at all the siblings were undertaking this important joint venture. Thus, apart from their oral evidence, there is nothing to back up the assertion that the purchase was as a result of contribution by the said siblings. This is in contrast to what the defendants adduced. There is the letter dated 30 October 1987 written by the late Abdalla himself. This was the letter forwarding the cheque and in it, Mr. Abdalla partly stated as follows :-

"Please refer to your letter of 14th April 1987 in respect of the above plot situated in Mgengo Mombasa District, Coast Province.

Herein enclosed, please find Cheque No. 388052 for Kshs. 15,000/-... being payment in respect of the above plot.

Please arrange for the transfer of the plot in my name and or issuance of the powers of attorney" (emphasis mine).

21. The letter above does not suggest that Abdalla was making payment for a group or on behalf of anyone. He was in fact asking that the plot be transferred into his name or he be issued with a power of attorney. The power of attorney can only be one donated by the vendors to him and it cannot be that he was asking to hold a power of attorney for his deceased father, for his father was already deceased.

22. The letter of 9 March 1992 is also telling. This is a letter that Abdalla wrote to the District Land Registrar Mombasa. He stated as follows :-

"... I bought the above plot from M/S Noorbhai and brothers. To date I have not been issued with a title deed for the same. I would appreciate to get my title deed or to know the status in respect of the title deed."

23. Yet again, this letter does not lead one to the conclusion that Abdalla was purchasing the plot on behalf of his siblings. The tone of the letter is apparent. In fact, Abdalla appeared anxious that he was yet to get title to the land, and he was relentlessly pursuing it to be issued in his name. This is what you expect from a person who has spent his money to purchase property. On the other hand, there is nothing in terms of a query or anything from the plaintiff and his siblings. You would expect that a person who has contributed towards purchase of property to be following it up. Since the plaintiff and his siblings were in Nairobi, you would expect a letter or even an informal note, making an inquiry on the progress. But there is nothing presented by the plaintiff. All he pegs his hopes on, is the receipt that was issued in the name of the deceased. That, I am afraid, is not sufficient to demonstrate that they contributed towards the purchase of the plot, or that Abdalla was

purchasing it for the family. We have to recall that the land owners had leased out the house to the deceased. The offer to purchase was being made to the tenants. I therefore do not find it unusual that the receipt bore the name of the deceased. It cannot, by any stretch of imagination be said that the deceased was purchasing the property, for he was not alive at the time. The issuance of the receipt in the name of the deceased was thus clearly a mistake, or was aimed at aligning payment to the name of the tenant in their records. There can be no other explanation. Apart from the above, you would also expect that the parties who contributed to be keen on the income that the premises is deriving and also be involved in any developments therein. However, it appears as if the property wholly fell in the control of Abdalla. He lived there, and alone, without the input or comment of his siblings, commenced the construction of a three storeyed building. If at all the plaintiff and the other siblings had contributed to the purchase of the land, you would expect that they would protest and be against the development, for the nature of the development was one to completely close out any interest that they had. There was no protest and no comment when Abdalla finished the ground floor. He unfortunately died before he could complete the rest of the block. To me, Abdalla appears to have been a man of industry whether he was employed or not. Although the plaintiff and PW-2 stated that he had fallen into hard times, this is difficult to believe. Even assuming that he was jobless, clearly, he had some sort of source of income, whether his own or with the help of his wife (the 1st defendant) which enabled him to undertake a venture of no mean proportion and it is apparent that he was heading somewhere before the cruel hand of death struck. Although PW-2 tried to insinuate that she contributed to the building by providing "mabati" I am not convinced. There is in fact no shred of evidence on this, and it is apparent to me that PW-2 was fishing for something to throw at the court in order to look as if she contributed to the development of the structure now therein.

24. From my above analysis, I come to the conclusion that it was Abdala, through his own sole effort and contribution, who purchased the suit property. He unfortunately died before the property could be transferred to him. I come to the conclusion that he was buying this property for himself, and not for or on behalf of his siblings or the estate of his late father. It follows that the plaintiff and his siblings have absolutely no stake in the suit property. They have no locus to question its propriety and no locus to contest any transfer of it. Neither can they anchor their claim on the concept of house without land for reason that the Swahili house is no more. There was a pathetic attempt to say that the Swahili house is still there by trying to use the words that it was "renovated." That house was not renovated. It either fell apart or was destroyed. What is there is now is completely different from what existed before. Moreover, there is no landlord, for the old landlords terminated the arrangement of house without land, when they offered the properties for sale. That relationship of holding house without land became extinguished. The land took over a new owner who now kept both house and land.

25. I am aware that the plaintiff took trouble to try and demonstrate that the title of the 1st defendant is a bad title. However, without locus, they have no basis of attacking this title, because whether I hold that the title is bad or good, they are not going to benefit from such holding. It is not therefore necessary, in the instance and circumstances of this case, for this court to interrogate whether the title to the suit land is a good title or bad title. I am unable to go into that within the context of the proceedings herein, having held that the plaintiff and his siblings have no stake in the property.

26. It will be seen from the above that I find no substance in the case of the plaintiff. I am in fact appalled by the manner in which the plaintiff and his siblings appear to have treated the 1st defendant. They took over the property when the husband of the 1st defendant died. Despite not making any contribution to the significant developments therein, they are now the ones enjoying the rent that accrues on the property, yet they were nowhere when the late Abdalla was alive. They had no guts to face Abdalla. They waited until Abdalla died then preyed on his poor widow. They have no shame in not even sharing a portion of the rent proceeds with the 1st defendant who is widowed. They operate as if the 1st defendant does not exist on the face of this earth. I tell them now, that the person who they consider to be a helpless widow has found help in the law. I now tell them, to their face, that they have no business in the suit property. They must give vacant possession of it forthwith and no later than 14 days from the date of this judgment. If they do not, the 1st, 3rd and 4th defendants are at liberty to appoint a court bailiff and proceed to evict them from the suit premises. This order is without any prejudice to the right of the 1st, 3rd and 4th defendants, to demand compensation for the duration of time that the plaintiff and his siblings have been in illegal enjoyment of the suit property.

27. The only issue left is costs. Sometimes, courts, when faced with disputes involving siblings, do order each party to bear their own costs. Not in this one. The plaintiff will pay the cost of this suit to the defendants. The result is that this suit is dismissed with costs.

28. Judgment accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY, 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA