



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.16 OF 2002
(Formerly Mombasa HCCC No. 56 OF 1995)

RAMADHAN IDDI

FATUMA IDDI

RIZIKI IDDI ALI

HALIMA IDDI RAMADHANI

ATHMAN OMAR BIMMA

ALI OMAR BIMMA

MOHAMMED HASSAN

ABDU HASSAN

AMINA HASSAN

RIZIKI HASSAN.....PLAINTIFFS

=VERSUS=

AGENT OF THE PUBLIC TRUSTEE FOR KILIFI AND LAMU DISTRICTS

OMAR ABDALLA

ABBAS ABDALLA

ABDULHARIM ABDALLA

AISHA ABDALLA

ASHRAF ABDALLA

LATIFA ABDALLA

FATMA ABDALLA

THE LAND REGISTRAR, MOMBASA.....DEFENDANTS

J U D G M E N T

1. This suit was commenced by way of a Complaint dated 24th January 1995 and filed in the Mombasa Registry on the same day. The file was subsequently transferred to this court and allocated the current reference number.
2. In the Complaint, the Plaintiffs described themselves as the heirs and persons beneficially interested in the Estate of the late Rehema Juma Haji and Fatuma Juma Haji.
3. The Plaintiffs averred in the Complaint that prior to 3rd September, 1992, the premises known as portion number 1638 Malindi (the suit property) was registered in the name of Mohamed Juma Haji, Haji Juma Haji, Aisha Juma Haji, Rehema Juma Haji and Khadija Juma Haji (all deceased).
4. According to the Complaint, the 1st Defendant purported to summarily administer the estate of only one of the aforesaid deceased persons namely Haji Juma Haji in Malindi Cause number 36 of 1989 and purported to transfer the suit property to the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th Defendants; that the purported transfer was fraudulent and illegal and that the 1st Defendant had no authority whatsoever to convey the suit property.
5. The Plaintiffs are seeking for a declaration that the sale agreement that was entered into between the 1st Defendant and the 2nd- 8th Defendants and the conveyance of 16th October 1989 is null and void, illegal and of no legal conveyance.
6. In their Defences, the Defendants averred that the transfer of the suit property by the 1st Defendant to the 2nd to the 8th Defendants was legal.

The Plaintiffs' case:

7. The 1st Plaintiff, PW1, informed the court that the other Plaintiffs are either his brothers or sisters, all being the children of his late mother Rehema Juma Haji (deceased).
8. It was the evidence of PW1 that their late mother was one of the registered owners of the suit property and should have inherited her share upon her demise.
9. PW1 informed the court that while pursuing the succession cause, they gave to the 1st Defendant the title document in respect to the suit property. However, they later on realised that the 1st Defendant had sold the entire suit property without their consent. PW1 produced in evidence the title document and the summary certificate that was issued to him by the 1st Defendant.
10. The evidence of PW1 was that the share that her late mother had in the suit property was not represented by the 1st Defendant. According to PW1, the 1st Defendant only had the mandate to deal with the share of Haji Juma Haji.
11. According to PW1, he received correspondence showing that the late Haji Juma Haji had renounced his share in the suit property and neither him nor the public trustee could sell it.
12. In cross examination, PW1 informed the court that he was not sure if Haji Juma Haji had sold his share in the suit property before he died.
13. PW1, a retired civil servant who used to work at the Ministry of Lands informed the court that the

Summary Certificate that was issued to the 1st Defendant was only in respect to the Estate of Haji Juma Haji and not the entire suit property.

14. PW2 informed the court that a Summary Certificate is usually issued when the value of the land is very low to require one to apply for letters of administration.

15. The evidence of PW2 was that according to the Certificate of Title, seven people were registered as proprietors of the suit property with each one of them holding either 2/7 or 1/7 share; that according to the Summary Certificate that was issued to the 1st Defendant, the share of the other six owners was not included and that the transfer of the suit property to 2nd – 8th Defendants should have been in respect of the share that was held by Haji Juma Haji alone.

The Defendants' case:

16. The 1st Defendant neither adduced evidence nor called any witness to testify.

17. The 2nd Defendant, DW1, informed the court that he bought the suit property together with his brothers in 1989; that they bought the land from Haji Juma Haji also known as Kaka Juma Haji and that Kaka Juma's share in the property was 2/7.

18. DW1 produced the agreement that they entered into with Haji Juma Haji also known as Kaka Juma Haji together with the original title document.

19. According to DW1, under the Islamic law, Haji Juma Haji could inherit the shares of his brothers and sisters who did not have children.

20. The evidence of DW1 was that he paid the late Haji Juma Haji Kshs.11,428.80 and paid the balance of the purchase price of Kshs.68,571.20 to the public trustee the 1st Defendant, who subsequently transferred the land to them.

21. According to DW1, the balance of the purchase price was paid to the public trustee because all the other people who were registered as proprietors were dead; that according to Islamic law, it was Haji Juma who could inherit his brothers' property and that Haji's brothers did not have children.

22. In cross examination, DW1 informed the court that the 2nd – 8th Plaintiffs are the children of Rehema one of the proprietors of the suit property and they received the payments from the public trustee.

23. DW2, an advocate, informed the court that the late Haji Juma Haji appeared before him ailing.

24. It was the evidence of DW2, an advocate of this court, that Haji's shares in the suit property was 2/7 and that he renounced his shares when he appeared before him.

25. According to DW2, Mr. Juma sold his share to the 2nd to the 8th Defendants and was paid Kshs.11,428.80 on the day he signed the agreement.

26. DW2 informed the court that the Kshs.11,428,80 paid to the late Haji Juma Haji was only in respect to his share in the suit property. The balance of the purchase price was paid to the public trustee. It was the evidence of DW2 that he is not aware what happened to the remaining 5/7 shares held by Hajis siblings.

27. DW3 informed the court that he witnessed the signing of the agreement between Haji Juma and the 2nd – 8th Defendants.

28. According to DW3, all the other shareholders in the suit property were dead by the time he agreement was executed.

29. DW3 stated that the 2nd – 8th Plaintiffs, who are the children of Rehema were aware of the sale of the land.

30. According to DW3, the public trustee was paid the money that was to benefit the children of Rehema. It was his evidence that the public trustee paid Fatuma Iddi who used the money to purchase a car for her husband.

Submissions:

31. The Plaintiffs' advocate submitted that until 3rd September 1992, the suit property was registered in the name of Mohamed Juma (2/7), Haji Juma Haji, (2/7), Aisha Juma Haji (1/7), Rehema Juma Haji (1/7) and Khadija Juma Haji (1/7); that the instrument of transfer conveyed the entire land to the transferees and that there is nothing to show what became of the interest of the co-owners before the execution and registration of the instrument of transfer made in favour of the 2nd – 8th Defendants.

32. Counsel submitted that there is no evidence of consent by the persons beneficially interested in the suit property allowing the 1st Defendant to deal with the suit land.

33. The Plaintiffs' counsel submitted that the transaction transferring the entire suit property to the 2nd- 8th Defendants had the effect of disinheriting the Plaintiffs whose parents were registered as co-owners of the suit land.

34. The 1st Defendant's counsel submitted that the 1st Defendant has adopted a neutral stand in the matter; that the principal function of the public trustee is to administer the estate of the deceased where a person has died and none of the heirs is prepared to undertake such administration and that the estate file for Haji Juma Haji was opened following his death.

35. The 1st Defendant's counsel submitted that the death of the tenants in common in the suit property having followed one another, the 1st Defendant consolidated their estate into one administration cause, that is cause no. 20 of 1970 and that all the siblings having predeceased Haji Juma Haji, the property vested in him as the sole direct heir.

36. Counsel submitted that the receipts on record shows that the heirs of the registered proprietors of the suit have been enjoying advances from the Kshs.67,821/20 that was forwarded to the 1st Defendant.

37. Counsel submitted that the 1st Defendant rightfully administered the estate of Haji Juma Haji and that as for the transfer of the suit property to the 2nd-8th Defendants is concerned, he was merely acting in a ministerial capacity to assist parties where advocates and parties themselves feared to tread.

38. The 2nd -8th Defendants' advocate submitted that the 1st Defendant had the authority and competence to act in the manner that he did because parties went to him willingly; that the full purchase price was paid and that the conveyancing documents were competent for purposes of registration.

Analysis and findings:

39. According to the original Certificate of Ownership that was issued on 26th July 1960 and produced by the Plaintiffs', parcel of land number 1638 Malindi (the suit property) was registered in favour of Mohamed Juma Haji (2/7), Haji Juma Haji (2/7), Aisha Juma Haji (1/7), Rehema Juma Haji (1/7) and Khadija Juma Haji (1/7).

40. The title shows the five individuals, who are all deceased, held undivided shares shown in brackets opposite their names. The ownership of the suit property was therefore a tenancy in common and not joint ownership.

41. The second entry in the original Certificate of Ownership shows that on 3rd September 1992, “a summary certificate cause number 36 of 1989 in the Estate of Haji Juma Haji (deceased) to the agent of public trustee as administrator” was registered against the title.
42. The third entry on the original Certificate of Ownership indicates that the entire suit property was transferred to Omar Abdalla, the 2nd Defendant, Latifa Abdalla, the 7th Defendant and Fatma Abdalla, the 8th Defendant on 3rd September 1992, which is the same day the Summary Certificate was registered.
43. The advocate who was involved in the drafting of the agreement in respect of the sale of the suit property between the late Haji Juma Haji and the 2nd – 8th Defendants informed the court that Mr. Haji Juma Haji approached him when he was ailing and informed him that he wanted to sell the suit property to the 2nd – 8th Defendants. By this time, all the other proprietors to the suit property were dead and Mr. Haji was himself ill.
44. The evidence of DW2 was that the parties had agreed that the purchase price for the entire property was Kshs.80,000 of which Mr. Haji was paid Kshs.11,428.80.
45. According to DW2, Mr. Haji directed that the balance of the purchase price should be paid directly to the agent of public trustee, the 1st Defendant, for the purpose of releasing the money to Ms Fatma Abdalla who had taken care of him in his illness.
46. Indeed a receipt dated 2nd October 1989 was produced in evidence to show that a bankers cheque for Kshs.68,571.20 was issued by Habib Bank Limited in favour of the 1st Defendant.
47. The evidence before me shows that DW2 did not prepare an agreement of sale but instead prepared an Indenture dated 8th September 1989 between Haji Juma Haji and Omar Abdalla, Abas Abadalla, Abdulkarim Abdalla, Aisha Abdalla, Ashiraf Abdalla and Latifa Abdalla.
48. The Indenture stated that the vendor, Haji Juma Haji, is entitled of 2/7 undivided shares of plot number 1638 Malindi.
49. The Indenture further stated that Mr. Haji had agreed with the purchasers to sale to them his 2/7 undivided shares at a price of Kshs.11,428.80, which amount was paid to him.
50. The Indenture never mentioned the conveyance of the other 5/7 shares held by Mr. Haji's co-owners. Indeed the Indenture only conveyed the 2/7 undivided shares held by Mr. Haji to the purchasers.
51. The issue of the purchase price of the entire suit property being Kshs.80,000 was not captured by the parties in the Indenture or any other document.
52. If the entire purchase price was indeed Kshs.80,000, and Kshs.68,571.20 was forwarded to the 1st Defendant to pay off the heirs of the other co-owners, then that aspect was never captured in the Indenture or agreement that the late Haji entered into with some of the 2nd- 8th Defendants. The Indenture drawn by DW2 shows that the late Haji only transferred his share in the suit property and not the entire property.
53. DW2 informed the court that on the same day he prepared the Indenture, he also drew “ a renunciation of shares” on the instructions of Mr. Haji.
54. It would appear that Mr. Haji was under the impression that he had inherited the shares of his co-owners, because he purported to renounce the shares of Mohamed Juma, Aisha Juma, Rehema Juma and Khadija Juma vide that instrument.
55. The “renunciation of share” document which is said to have been signed by the late Haji is of no legal effect considering that the shares that were held by his co-owners could only be inherited by him either

through a succession cause pursuant to the provisions of the Law of Succession Act or by a declaration by a Kadhi pursuant to the provisions of the Kadhis Act.

56. In any event, the Plaintiffs, who are the children of Rehema Juma Haji were the ones who were entitled to the share of their mother and not Mr. Haji.

57. Having sold his 2/7 undivided shares, the Indenture of 8th September, 1989 should have been registered against the title. However, that was never done but instead the 1st Defendant signed a Transfer dated 16th October 1989 transferring the entire land to the 2nd -8th Defendants.

58. In the Transfer document, the 1st Defendant has described himself as “administrator of the estate of the five registered owners of the suit property”. The transfer document was registered against the title on 3rd September 1992.

59. The transfer document by the 1st Defendant was signed on 16th October 1989, while the Indenture by Mr. Haji was signed on 8th September 1989. The evidence of DW2 was that Mr. Haji died within one week of signing the Indenture.

60. The 1st Defendant did not call any witness to explain why he would administer the Estate of all the deceased by selling their respective shares before registering a Summary Certificate for each of the shareholders, and more so when some of the shareholders were survived by children.

61. As correctly submitted by the 1st Defendant's counsel, the 1st Defendant can deal with an estate that does not exceed Kshs.100,000 summarily.

62. However, in this particular case, the only summary certificate that was registered by the 1st Defendant as entry number two was in respect to the Estate of Mr. Haji and not the estate of the other four co-owners of the suit property.

63. Having not registered summary certificates for the other co-owners, the 1st Defendant had no legal mandate to transfer the entire suit property to Mr. Omar, Latifa and Fatma on 3rd September 1992 as he purported to do.

64. The transfer document signed by the 1st Defendant transferring the suit property to some of the Defendants had the effect of disinheriting the other beneficiaries, whose parents were registered as co-owners of the suit land.

65. The transaction between the 1st Defendant and the 2nd – 8th Defendants was therefore tainted with illegality. All the Defendants herein participated in the illegal transaction and the same cannot stand. The status quo prior to the transactions of 3rd September 1992 should be upheld.

66. In the circumstances, and for the reasons I have given above, I allow the Plaintiff's Complaint dated 24th January 1995 in the following terms:

(a) A declaration be and is hereby issued that the sale entered into between the 1st Defendant and the 2nd -8th Defendants and the conveyance dated 16th October 1989 and registered against the title for portion number 1638 Malindi on 3rd September 1992 is null and void, illegal and of no legal conveyance.

(b) An order be and is hereby issued to the 9th Defendant to expunge from the record entries numbers 2 and 3 conveying portion number 1638 Malindi to the Defendants and entries numbers 4 and 5.

(c) The Defendants to pay the costs of the suit jointly and severally.

Dated and delivered in Malindi this **13th** day of **November** 2015.

O. A. Angote

Judge