



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 177 OF 2012

HUSSEIN FARAH MAHAMUD.....PLAINTIFF/RESPONDENT

- V E R S U S -

1. HASSAN MOHAMED HUSSEINDEFENDANT/RESPONDENT

2. SAID MOHAMED HUSSEIN.....DEFENDANT/RESPONDENT

AND

SAUMU WAMBUI KANYOKO INTERESTED PARTY

JUDGMENT

[1] The plaintiff herein Mr. Farah Mohammed bought Plot Number 138/2 Section XI Mombasa/Block XII/136 (New Plot Number Mombasa/Block XI 893 from Hassan Mohamed Hussein and Said Mohamed Hussein all of P.O. Box 636 Kilifi. The agreement for sale stated that the vendors were beneficiaries to the estate of their father Mohamed Hussein Omar and the agreement contained a clause that stated that the vendors were to get confirmation from the Chief of their location confirming that they are entitled to sell the property aforesaid. The agreement was dated 6th October 2011. The purchase price was Kshs 11 million. The agreement was for sale of Plot Number 138/2 Section XI. However, the true position was that their deceased father only owned a Swahili house, that was on the land known as Plot Number 138/2 Section XI. The land itself was owned by Hasham Adamji, Ashwin Ratilal Doshi and Nailesh Ratilal Doshi all of P.O. Box Number 80628 Mombasa in the concept in the Coast of Kenya now known as house without land.

[2] The purchase price was apparently paid to the purchasers advocates for the beneficiaries of Mohammed Hussein Omar. From the said amount Kshs. 200.000.00 was paid to the land owners aforesaid who upon payment signed transfer of land in favour of the plaintiff herein and the transfer was registered in the Mombasa Land Registry on 16th March 2012. During the hearing of this case, various other cases were referred to me involving the parties. I therefore called for the files which had been handled by the Chief Kadhi's court at Mombasa *Succession cause no. 211 of 2011* and *Succession cause No. 4 of 2013* to assist me to resolve the dispute herein.

[3] In the meantime and after the said sale and the deposit of money with the advocates, Salim Mohammed Hussein, a son of Mohammed Hussein Omar (deceased) filed a *Succession Cause No. 4 of 2013* in the Kadhi's Court at Mombasa. He stated in his petition that the deceased died on 5th December

1997 at Sokoni Kilifi and left the following;

- (a) Bakari Mohamed Hussein (also deceased)
- (b) Said Mohamed Hussein (Son)
- (c) Salim Mohamed Hussein (Son)
- (d) Hussein Mohamed Hussein (Son)
- (e) Mariam Mohamed Hussein (daughter)
- (f) Mishi Mohamed Hussein (daughter)

He further stated in the petition that the deceased left Msa/Block XI 893 which has been sold to Hussein Farah Mohamed (plaintiff herein) for Kshs. 9,800,000.00. In that petition M/s Sachdeva & Co. wrote to the Chief Kadhi Mombasa Law Courts on January 2013 requesting for devolution of funds the Ksh. 9,800,000.00 held by them for the beneficiaries of the deceased Mohamed Hussein Omar. An order was made on 9th January 2013. It set the legal heirs of the deceased and their shares as follows;

- (a) Bakari Mohamed Hussein (deceased) Kshs. 1,960,000
- (b) Said Mohamed Hussein (son) Kshs. 1,960,000
- (c) Salim Mohamed Hussein (son) Kshs. 1,960,000
- (d) Hassan Mohamed Hussein (son) Kshs. 1,960,000
- (e) Mariam Mohamed Hussein (daughter) Kshs. 980,000
- (f) Mishi Mohamed Hussein (daughter) Kshs. 980,000

The order was later amended on 21st May upon the inclusion of an interested party as follows;

- (a) Bakari Mohamed Hussein (son) - Kshs. 1,633,333
- (b) Said Mohamed Hussein (son) - Kshs. 1,633,333
- (c) Hussein Mohamed Hussein (son) - Kshs. 1,633,333
- (d) Salim Mohamed Hussein (son) - Kshs. 1,633,333
- (e) Hassan Mohamed Hussein (son) - Kshs. 1,633,333
- (f) Mariam Mohamed Hussein (daughter) - Kshs. 816,666
- (g) Mishi Mohamed Hussein (daughter) - Kshs. 816,666

Further on 31st October 2013 the share of Bakari Mohamed Hussein (deceased) the husband of the defendant herein was devolved as follows:

1. Two widows each Kshs. 102,083.30
2. One son Kshs. 571,666.50
3. Three daughters each Kshs. 285,833.30

[4] Previously, Saumu Kanyoko the defendant herein had filed a succession petition of her husband Bakari Mohamed Hussein (deceased). The suit was against Said Mohamed Hussein, Hussein Mohamed Hussein and Salim Mohamed Hussein, her late husbands brothers. In her petition she named the survivors of the deceased as;

Saumu Kanyoko - widow
Mariam Bakari Mohamed - Daughter
Fatuma Bakari Mohamed - Daughter
Zainabu Bakari Mohamed- Daughter
Mohamed Bakari Mohamed- Son

She also named the deceased properties as

- (i) Share of his inheritance from his deceased father's estate/properties a Swahili house on plot no. 138/2 Section XI at Sparki Mombasa.
- (ii) The extension shop in front of the house on Plot 138/2 Section XI at Sparki built by the late Bakari Mohamed Hussein.
- (iii) Share of inheritance from the deceased father's house on Plot no. 125 IV/23 Kilifi.

The 3rd defendant on 19th December 2011 replied to the petition and admitted the entire petition while the other two respondents did not reply and an interlocutory judgment was entered against them on 29th December 2011 and the matter was fixed for formal proof on 25th June 2012 and there the matter rested.

[5] Mr Hussein Farah Mohamed the plaintiff in this case gave evidence in court that he bought the suit property from the defendants and that he was supposed to be given the property in vacant possession. He stated that they have not given him the property in vacant possession. His witness Mr Hassan Mohamed Hussein, a brother of the defendants said that his father had houses in Miritini, Changamwe and Kilifi. He said that the said houses had land rate debts as follows;

Kilifi house Kshs. 80,000.00
Changamwe house Kshs. 80,000.00
Miritini house Kshs. 80,000.00
House at Sparki over 1.1.million

He stated that there was no one to pay this money since these were inheritance properties and none of the heirs wanted to pay. The debt for the house at Sparki was Kshs. 1.1. million and the rates were still accruing. He said that they decided to look for buyers and the house that got the buyer is the suit premises in this case. The witnesses stated that the defendant was given his share in the sale of the sparki house. He said that the defendant herein has shares in all the other houses. He however denied that the husband of the deceased built anything at the house in Sparki.

[6] The other witness for the plaintiff Ms Mariam Mohamed Hussein gave evidence that the house at Sparki was her fathers who is dead. She said that it is occupied by her bothers wife. That her brother is Bakari Mohammed and that he is dead. She said that they sold the house to the plaintiff for Kshs. 11 million and that the money was apportioned by the Kadhi. That the defendant had been given her portion and that she has not taken the same. She said that the defendants had not left the house. That her father had houses in Miritini, Magongo and Kilifi. She said those houses have not been sold. Finally she said

they had talked about these issues before the Kadhi. She said all houses are up for sale if buyers are available and that the plaintiff and her children are free to occupy any of these properties.

[7] The defendant Saumu Wambui Kanyoko gave evidence that she lives at the Sparki house where she had lived with her husband Bakari Ahmed Hussein. She said she knew the house belonged to his father but her husband built three extensions. She said the ground on which the house stands belongs to Doshi. She said they were told to stay there by her father in law. She urged the court to let her and her four children to stay on the suit property. She argued that the others were given other houses and that the defendants have not advertised the other houses for sale. On cross examination she admitted that the plaintiff bought the house from Hussein Farah Mohamud and Said Mohamed Hussein and that the plaintiff bought the land from Doshi the owner. Further that when the proceeds of the sale of the house was being devolved by the Kadhi she attended the second time and objected but the Kadhi still devolved and distributed the money. She admitted that her husband has a second wife one Shufaa Shabai who is alive but has no children and that she lives in another house (rented) at Sparki. The defendant called the other witnesses Zainabu Bakari Mohamed and Mohamed Bakari Mohamed. These were her daughter and son who merely restated what she had stated in regard to and about staying on the premises and the construction of annexures by their late father.

[8] The first issue for determination is whether the said Hussein Mohamed Hussein and Said Mohammed Hussein had locus standi to sell the house without land of their deceased father without having obtained letters of administration of his estate and whether they could pass any title to the plaintiff herein. Secondly, whether the interested party now the defendant herein has locus standi to file any pleadings and to defend this suit without having obtained letters of administration of her husband one Bakari Mohamed Hussein who was a son of the owner of the Swahili house aforesaid. Thirdly, whether the transfer of Mombasa Block XI/893 by Hasham Adenji, Ashwin Ratilal Doshi and Nailesh Ratilal Doshi (the owners of the land) to the plaintiff herein was fraudulent as alleged by the defendant Saumu Kanyoko.

And finally, whether the defendant herein should move and vacate out of the suit land together with her family and all her belongings to give the plaintiff vacant possession.

[9] The question of whether parties professing muslim faith need letters of administration has been dealt with in *HCCA No. 55 of 1999 Rashid Zahran v Azan Zahran & 4 others* (per Ibrahim J (as he then was) where the judge proposed that the letters of administration is not a requirement under Islamic Law for purposes of inheritance proceedings. He held that the requirement that one obtains letters of administration of the Estate of a deceased Muslim before management and distribution thereof would be inconsistent with Muslim Law. He quoted M.M. Khan on Islamic laws of inheritance as follows;

"administration as understood by modern law was unknown the Islamic jurisprudence. In Islam there is more distribution of property of the deceased by the state if not by the heirs themselves. Unlike other modern systems to dispose the estate of a Muslim, neither there is need of an executor or administrator or/and letters of administration. In the absence of an executor appointed by will of a deceased, heirs of a Muslim have the right and capacity to dispose of the estate of the propositions according to law. In case they fail to do so, the Kadhi (magistrate) may appoint an executor."

This decision has since been followed with approval by Sergon J in the case of *Estate of Said Seif Salim Bussaidy* and in the *Estate of Said Abdalla Mombasa HCCC. Misc. application no. 736 of 2011* by Muriithi J.

[10] The parties to this case are all Muslims. They all profess the same faith. The previous defendants and the current defendant have all subjected themselves to the jurisdiction of the Kadhis court through the suit they have filed, *Succession Cause No. 211 of 2011* and *Succession Cause No. 4 of 2013* aforesaid. I therefore hold that the parties being Muslims and having subjected themselves to that faith, Islam Law of Succession applied and there was therefore, no need to have letters of administration before entering into negotiations to sell the house without land that stood on the suit land Mombasa/Block XI/893 which was

subsequently transferred to the plaintiffs by the registered owners.

[11] The defendant herein came to this suit as an interested party. However on 15th April 2013 Mr Ngeno who appeared for the defendants withdrew from acting, he agreed with the advocate for the interested party that she becomes the defendant. The other defendants abandoned defending the suit. The defendant Mrs. Saumu Kanyoko became a defendant without obtaining letters of administration of the estate of her deceased husband one Bakari Mohamed Hussein. Ordinarily, she would have been required to obtain letters to enable her to have locus standi and have the ability to defend the suit otherwise her pleadings ought to be struck out for lack of standing. However, she came into this suit as an interested party and later transited into a defendant. The suit was about eviction, indeed her own eviction and that of her children from a premises sold by members of her family sold to the plaintiff under dictates of Muslim law that required no letters of administration. A faith she professed herself and subjected herself into. I do not think that under the circumstances she should be shut out of defending the suit just because the case is not before the Kadhis court. I do not think either that under the unfolding scenario she needs letters of administration to do so. I hold that as a Muslim she is properly before the court and her pleadings are proper.

[12] The facts of this case show that all the parties have agreed that this was a case of house without land. The land being owned by others. There is also no dispute that the deceased Mohamed Hussein Omar was the owner of the Swahili house on the suit land and that he had seven children namely

1. Bakari Mohamed Hussein (deceased) a son and husband of the defendant,
2. Said Mohamed Hussein a son
3. Hussein Mohamed Hussein a son
4. Salim Mohamed Hussein a son
5. Hassan Mohamed Hussein a son
6. Mariam Mohamed Hussein a daughter
7. Mishi Mohamed Hussein a daughter

It is also not disputed that he owned other properties in Miritini, Changamwe and Kilifi and that all these properties were in arrears of rates and rent. What is in dispute, is whether the house at /sparki Mombasa was owned by the defendant and one son of the defendant or whether it was owned by all the beneficiaries. Further, whether there were any improvements therein by the husband of the defendant during his life time. The defendant in her petition in *Mombasa Kadhis court case no. 211 of 2011* dated 18th October 2001 stated that her husbands property as at death was,

"(1) A share of his inheritance from his deceased father's estate/properties a swahili house on plot no. 132/2 Section XI at Sparki Mombasa.

(ii) The extension shop in front of house on Plot no. 138/2 Section XI at Sparki in Mombasa built by late Bakari Mohamed Hussein.

(iii) Share of inheritance from deceased's father's house on plot no. 125 IV/23 Kilifi.

It is quite plain and obvious that she was praying for a share. Infact she also claimed for a share of her husbands inheritance of the deceased father's house at Kilifi. She got a judgment for her claim in Mombasa Kadhis Succession Cause No. 11 of 2011 on 29th December 2011 and all that is awaited is formal proof. No one opposed her prayers. She was supposed to formally proof her case on 25th July 2012. She has not done so. The defendant therefore cannot be heard to ask from this court for more than she requested and got at the Kadhis court. A court that is empowered by the Constitution do so. When

the Swahili house was bought, the vendors, her husbands brothers did not take the money with them, they only paid land rent and other commissions and the rest of the money was left with Schedeva & Co. Advocate pending devolvement by the Kadhi's Court as per Muslim law of succession. That was done vide *Mombasa Kadhi Succession Case No. 4 of 2013*. The shares of all the deceased's children were identified. Her husbands share was identified as Ksh. 1,633,333 which was to be shared as follows;

1. Two widows each Ksh.102083/30
2. One son Ksh. 571666/50
3. Three daughters Ksh. 285833/30

This was her husbands share from the Sparki House. This decision by the Kadhi's court, as far as I am aware, is not appealed from. It remains therefore an order of that court. The other properties of the said, Mohamed Hussein Omar were not distributed. The court was told that the beneficiaries are looking for buyers for the same. It would have been desirable for all the assets to be put together and distributed at one go. There is nothing however to tell the court that under Muslim law they cannot be distributed at a later stage. One thing however is for sure, it was admitted by all beneficiaries of Mohamed Hussein Omar who gave evidence that, Bakari Mohamed Hussein (deceased) the husband of the defendant herein is entitled to his share in the properties at Miritini, Changamwe and Kilifi belonging to his late father. The defendant and her children therefore, have a further inheritance to come into their way.

[13] The transfer of the suit land by the registered owners Hasham Adamji, Ashwin Ratilal Doshi and Nailesh Ratilal Doshi was done pursuant to the accepted policy of house without land. Once the owners of the house informed them of the intention to sell the house without land, the purchaser then had only to pay the purchase price of the land. In this case it was Kshs. 200,000.00. It must be remembered that the owner of the house without land was deceased and the beneficiaries informed the Doshi family of their intention to sell. This being a muslim culture that operates on utmost good faith, the owners had no choice but to oblige and signed the transfer. Indeed the witnesses who appeared before the court said that this was a family decision. The only person who resisted it was the defendant who was living on the suit land and was collecting rent therefrom. She was not completely ignorant of such sale as she alleged. she admitted that she attended the hearing before the Kadhi for distribution on the second hearing. My perusal of the distribution file before the Kadhi's court does not reveal any protests of such sale from her or even the distribution of her husband's entitlements.

[14] I hold therefore than the transfer to the plaintiff of the suit land by the registered owners was proper and lawful. I find no fraud as alleged as none was proved before me. The fact that during the hearing of this case, the plaintiff offered the defendant Kshs. 1,000,000.00 to move out does not change anything in my view. He told the court that he was doing so as a muslim and out of compassion since the defendant has children living in the premises. This he said was to compliment the share of the defendant from the sale of the house to enable her to get an alternative accommodation. The offer was rejected. Further at the hearing hereof the plaintiff had also offered the defendants the option of having his money refunded. This offer was not taken as some money had been used up in paying rates and other costs of the suit land and apparently the purchase price had been distributed to the other beneficiaries.

[14] The defendant was not at all able to prove her assertions in the counter claim save for ownership of a share as a beneficiary of Bakari Mohamed Hussein who was equally a beneficiary of a share of his father's estate one Mohamed Omar Husein.

I order that the defendant is only entitled to her share in the estate of Bakari Mohamed Hussein as devolved and established by the Kadhis court, otherwise the counterclaim fails and is dismissed with no order as to costs.

I further find that the plaintiff is entitled to vacant possession of the suit premises.

The defendant shall move out with her children and give vacant possession to the plaintiff within 30 days.

If she does not do so, she will be evicted therefrom by the court bailiff with the help of the policeman and administration policemen of the nearest police station. she will bear the cost of such eviction.

Finally I give judgment for the plaintiff and against the defendant (formerly interested party) Saumu Kanyoko as prayed with no orders as at to costs other than otherwise stated.

Dated and delivered in open court at Mombasa this 30th day of October 2014.

S. MUKUNYA

JUDGE

30.10.2014

In the presence of

Mr. Kaburu advocate for the defendant

Mr. Ratemo advocate for the plaintiff