



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 32 of 2006**

**JALAL M. TAYEBALI ..... PETITIONER**

**VERSUS**

**TOTAL KENYA LTD. .... RESPONDENT**

**RULING**

**Jalal Mohamed Tayabeli, the applicant**, instituted this suit by originating summons, on 4<sup>th</sup> July 2005 claiming against **the Respondent, Total Kenya Limited**, determination of the following questions.

- (1) *The subsisting right of the Estate of Taherali Mulla Mohamed over L.R. No.11492/2 Mariakani Kilifi.*
- (2) *Any right and/or interest of Total Kenya Limited over the property.*
- (3) *The ascertainment of the heirs to the property and their interest thereof.*
- (4) *Directing the executors/administrators to forthwith rescind any invalid illegal and or other lease, transfer license or other assignment or sale of any interest and or right over or in the property of the estate of the deceased and to thereof make and apply the said property in accordance with the terms of the Grant and in any even I the best interest of the deceased's estate and all the heirs thereof.*
- (5) *The furnishing of accounts relating to income from the deceased's property L.R.No.11492/2 Mariakini, Kilifi.*
- (6) *The declaration that the purported transfer dated 10<sup>th</sup> May 1994 to Total Kenya Limited for Ksh.1,500,000/= was a nullity, illegal and contrary to the will of the deceased and the Grant of representation of the estate of the deceased.*

In the affidavit sworn on 4<sup>th</sup> July 2005 in support of the originating summons, the applicant averred in paragraphs 1 to 17 as follows:

1. *That I am the applicant herein by virtue of being the duly appointed attorney of Moizali Taherali by a Power of Attorney given on January 6<sup>th</sup> 2004 and I am conversant with the facts of this matter and duly competent and authorize to swear this affidavit.*

2. *That the County Council of Kilifi granted to Ebrahim Mulla Mohamed the property L.R. Number 11492/2, for valuable consideration, a leasehold interest for 99 years from the 1<sup>st</sup> October 1965 at an annual premium of Ksh.2,400/=*

3. That the said Ibrahim Mulla Mohamedbhai transferred to Taherali Mulla Mohamedbhai one half undivided share of the property.
4. That on the demise of Ebrahim M. Mohamedbhai, Taherali Mulla Mohamedbhai inherited the one half undivided share thereof and the same was transferred to him on 25<sup>th</sup> January 1985.
5. That on the demise of the said Taherali Mulla Mohamedbhai inherited the one half undivided share thereof and the same was transferred to him on 25<sup>th</sup> January 1985.
6. THAT on the demise of the said Taherali Mulla Mohamed the said property was rested in his Estate and was to be distributed to his heirs, including his wife Mrs. Safiyabhai Taherali in accordance with the Shia Sect of the Mohammedan Law.
7. That by his Will dated 12/2/86 he appointed his sons Mohamed Hussein Taherali and Moiz Taherali to be Executors and Trustees of his Will.
8. That the said Executors/Trustees of the said Taherali Mulla Mohammed obtained Grznt of representation of his Estate and the same was confirmed by this Honourable Court on 26<sup>th</sup> September 1991.
9. That in early 1991, Moizali Taherali Mulla one of the Executors of the Estate of the deceased relocated to Canada and owing to his expected long absence from Kenya he executed a General Power of Attorney in favour of Mohamed Hussein Taherali to enable him look after his routine affairs in Kenya.
10. That the lease granted to Total Oil Products (East Africa) Limited expired on 1<sup>st</sup> January 1987 whereupon the said company continued to occupy and utilize the L.R. No.111492/2 without making any payments whatsoever to the Estate of the late Taherali Mulla Mohamedbhai.
11. That by a letter dated 31<sup>st</sup> August 1988 and without any legal authority or capacity and without consulting and obtaining consent from all the heirs/beneficiaries of the Estate of Taherali Mulla Mohamedbhai (deceased), one Hussein Mohamedbhai purported to grant a 30 years consideration and on very prejudicial, terms and at no consideration whatsoever to the estate of the deceased.
12. That the said Mohamed Hussein Taherali on or about the 10<sup>th</sup> May 1994 purported to transfer to Total Kenya Limited, in consideration of the sum of Ksh.1,500,000/= all his rights and those of Moiz Taherali Mulla Mohamedbhai in the property in L.R. No.11492/2 belonging to the Estate of the deceased and which property is valued at Ksh.20,000,000/=
13. That the transactions and agreements entered into as between the said Mohamed Hussein Taherali and Total Kenya Limited were invalid, fraudulent and in contravention of the provisos of the will and Last Testament of the deceased and calculated at depriving the Estate of the deceased the said property and disinheriting the heirs of the deceased Taherali Mulla Mohamedbhai.
14. That the said Total Kenya Limited has remained on the property and occupied and utilized the same without paying any rents to the estate of the late Taherali Mulla Mohammedbhai.
15. That unless this Honourable Court intervenes and ascertains the respective shares of the heirs of the Estate of the deceased and the rights subsisting over the property and the entitlement of Estate as regards the use and occupation of the property by Total Kenya Limited since 1988, the estate and heirs thereto stand to lose their entitlement and their rights may be extinguished thereof at no consideration to them whatsoever.
16. That my advocates on record have issued several Demand Notices to Total Kenya Limited but the respondent has not made payment and or relinquished possession of the property.

17. That now produced here and marked "JMT 1" is a bundle of relevant documents referred to herein and in support of my application.

The respondent entered appearance to the suit on 27<sup>th</sup> July 2005 and on 14<sup>th</sup> September 2005 filed a replying affidavit sworn on 30<sup>th</sup> August 2005 by Franklin Juma, Manager, stating, inter alia, in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 as follows:

3. That it is true that Ebrahim Mulla Mohamedbhai (deceased) granted to Total Oil Products (East Africa) Limited a lease over the property L.R. Number 11492/2 for a term of 20 years from the 1<sup>st</sup> January 1967 at an annual rent of Ksh.2,00.00)

4. That the respondent herein agreed with Mohamed Hussein Taherali in his capacity as a General Holder of a Power of Attorney donated to him by the Applicant and also one of the Administrators of the testate estate of Taherali Mulla Mohamedbhai to lease the suit property for a further term of thirty years.

5. That the terms of the lease were agreed between the said Mohammed Hussein Taherali and the Respondent.

6. That the said Mohamed Hussein Taherali in his capacity as an administrator of the testate estate of Taherali Mulla Mohamedbhai agreed to transfer the lease to the Respondent

7. That the respondent entered into the agreement referred to in paragraph 6 above knowing very well that the said Mohamed Hussein Taherali had the capacity to do so.

8. That the respondent has made all payments to the said Mohamed Hussein Taherali who would be held accountable for the same.

9. That the plaintiff has no cause of action against the respondent.

10. That the issue of ascertaining the shares of the heirs of the estate of the deceased and the rights subsisting over the property is a matter not involving the Respondent.

The evidence shows that the transfer of title to the subject property No.L.R. 11492/2 was on 26.4.1971, registered in favour of Tahara Mulla Mohamedbhai in respect of  $\frac{1}{2}$  **undivided** share of Mulla Mohamedbhai and that on 29.12.1988 Tahara Mulla Mohamedbhai was registered as the beneficiary in respect of the  $\frac{1}{2}$  share of Ibrahim Mulla Mohamedbhai. At that time the 20 year lease to Total Oil Products (E.A.) Ltd. registered on 2.1.1970 had about two years to go before its expiry in 1990.

On 26.6.1996, Certificate of Confirmation of Grant dated 25.11.1991 confirming the Grant of Probate issued to Mohamedhussein Taherali and Moiz Taherali as administrators of the Estate Taherali Mulla Mohamedbhai was registered. On 21.9.1996, a transfer dated 10.5.1994 transferring the subject property to Total Kenya Limited in consideration of Shs.1.5 million was registered. There are six affidavits filed by the parties in this matter. Two affidavits were sworn by Jalal Mohamed Tayebali on 04.07.2005, and 30.10.2008 and two affidavits were sworn by Franklin Juma on 30.08.2005 and 06.09.2008. Mohamed Hussein Tehari Mulla and Boniface Abala each swore one affidavit on 28.09.2009 and 10.10.2011 respectively. The only other affidavit in the matter is that sworn on 30.06.2011 by Jalal Tayabeli in support of the Chamber Summons application for directions. The affidavit sworn on 28.09.2009 by Mohamedhussein Taherali Mulla annexed documents marked "MTM 1" to "MTM 7" while the affidavit sworn on 06.09.2008 by Franklin Juma annexed documents marked as numbers 1 – 5 and F51.

Messrs Makhecha & Gitonga, Advocates for the Applicant filed on 26.03.2012 their written submissions while Messrs Muriu Mungai & Co., Advocates for the Respondent, filed their submissions on 23.04.2012. On 04.04.2012, Mr. C. S. Maonde, Advocate, appearing for the respondent sought 7 days to respond to the applicant's submissions. He was granted the time to do so. He did not file anything. On 05.06.2012, Mrs. L. Muchira, Advocate, holding brief for Ms Wanja Mati for the applicant and Mr. F. M. Kinyanjui, holding brief for Ms Maundu for the Respondent, informed the court that the parties had filed

submissions and they sought a date for a ruling or judgment.

I have perused all the material placed before the court including the written submissions by counsel.

This is not a case relating to probate matter. When Taherali Mulla Mohammedbhai died on 21<sup>st</sup> of April 1986, succession proceedings were commenced in this court at Mombasa in Cause Number 81 of 1987 and the deceased's estate was distributed in that cause as evidenced by the certificate of confirmation of the grant issued on 25<sup>th</sup> November 1991.

The subject matter in this suit is property No. L.R. 11492/2, Kilifi which originally belonged to Ebrahim Mulla Mohamed. It was given to him by the County Council of Kilifi through a Grant dated 04.06.1966 for a term of 99 years with effect from 1<sup>st</sup> October 1965. On 26<sup>th</sup> April 1971, Ibrahim Mulla Mohamed transferred to Taherali Mulla Mohamedbhai the deceased in Succession Cause No.MSA H.C. Cause No.81 of 1987 ½ undivided share of the said property. When Ibrahim Mulla Mohamedbhai died, a Grant of Probate was made on 09.01.1974 in Cause No.9 of 1973 to Zehrah Ebrahim Mulla Mohamedbhai as executor who by a transfer dated 25.01.1985 transferred to Taherali Mulla Mohamedbhai as beneficiary ½ share of Ebrahim Mulla Mohamedbhai in the said property. Needless to emphasize, when the certificate of Confirmation of Grant in the Estate of Taherali Mulla Mohamedbhai was registered on 26.06.1996, it related only to ½ undivided share in property No.L.R. 11492/2 Kilifi. By virtue of a transfer dated 10.05.1994, Mohamedhussein Taherali and Moize Taherali as administrators of Taherali Mulla Mohamedbhai deceased could only pass title in respect of ½ undivided share in L.R. 11492/2 Kilifi and no more. There is no pending cause in this court involving any person in relation to property No.11492/2 Kilifi. Mombasa High Court Cause No.81 of 1991 involving the Estate of Taherali Mulla Mohamedbhai was finalized in the year 1991 and a certificate of confirmation of Grant was issued on 25.11.1991. The heirs of the undivided ½ share in L.R. 11492/2 Kilifi were entitled to do as they wish with their legacy. Any dispute emanating from contract between them and their licencees or grantees or transferees is not a matter that falls within the provisions of the Law of Succession Act.

This suit is disguised as a succession matter. It is not. It is a dispute involving property owned by the applicant which (property) is in possession of the respondent ostensibly following execution of instruments of transfer between the parties. That dispute has nothing to do with succession. The applicant must file appropriate proceedings to ventilate its claim in the Land and Environment Division. Such claim cannot be litigated through originating summons which is a summary proceeding.

As it is clear to me that this is a land matter, I direct the Deputy Registrar to relay the file to the Land and Environment Division.

**G. B. M. KARIUKI, SC**

**JUDGE**

**Dated and delivered at Milimani Law Courts, Nairobi, on this 25<sup>th</sup> day of April 2013 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.**

**W. MUSYOKA**

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**JUDGE**