



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 423 of 1999

KHADIJA BINTI SHEIKH BIN

OMAR AL-MAWIA.....PLAINTIFF

VERSUS

HAROUN RASHID AHAMED1ST DEFENDANT

MOHAMED RASHID AHMED2ND DEFENDANT

ABDULMALIK RASHID AHMED3RD DEFENDANT

FATUMA RASHID AHMED4TH DEFENDANT

J U D G M E N T

By a plaint dated 14th November 1997, Khadija Binti Sheikh Bin Al-Mawia and Uba Zainabu Sheikh Athmani being the 1st and 2nd plaintiffs respectively sought the following orders:

- (a) *Vacant possession of the suit property.***
- (b) *Disposal of the suit property and distribution of the proceeds into shares above shown.***
- (c) *Costs of the suit.***

Haroun Ahmed, Mohamed Rashid Mohamed, Abdulrazak Rashid Ahmed and Fatuma Rashid Ahmed were named as the 1st, 2nd, 3rd and 4th Defendants respectively. The quartet filed a joint statement of defence denying the plaintiffs' claim. The suit was filed in the Senior Principal Magistrate's Court vide Mombasa S.P.M.C.C.C. No. 5317 of 1997. By an order of this court given on 9th July 1999 vide Mombasa H.C. Misc. Civil App. No. 148 of 1998, the aforesaid suit was withdrawn from the Senior Principal Magistrate's Court and transferred to this court for hearing and determination.

When the suit came up for hearing the plaintiff tendered the evidence of Khadija Al-Mawia while the defendants closed their case without calling for evidence in support of their defence. Khadija Al-mawia (P.W.1) told this court that they inherited the plot in dispute i.e. Mombasa Block XLV/110 from Fatuma Binti Bakari Marwan, deceased. She was the trustee to Halima Athuman, Khadija Athuman, Uba Athuman and Omar Athuman. The aforementioned beneficiaries are dead save for P.W. 1 and Uba Athuman. P.w.1 claimed they have never benefitted from the plot. She said the Chief Kadhi cancelled

the trust deed and ordered for the property to be sold and for the proceeds to be shared amongst the beneficiaries. P.w.1 produced in evidence as an exhibit a certified copy of the Chief Kadhi's order of 20th May 1997. On the basis of that order a title deed was issued in the names of all the beneficiaries of the Wakf. P.W.1 produced the title in respect of L.R. No. Mombasa/Block XLV/110 as an exhibit in evidence. P.W.1 asked this court to grant judgment as prayed. On cross-examination P.W.1 admitted that she only sued Haroun Rashid Ahmed and Uba Athuman in Civil Suit No. 74 of 1996 yet the Wakf had more than two parties. She never sued all the beneficiaries named in the title before this court.

At the close of the evidence, learned counsels on both sides filed written submissions. In his submissions, Mr. Kiume Kioko, learned advocate for the plaintiffs urged this court to grant judgment as prayed. Mr. Kiume Kioko dismissed the submission to the effect that the suit is resjudicata on the basis that there was no evidence tendered to prove that.

On his part, Mr. Asige the defendants' learned counsel asked this court to dismiss the suit on the basis that they have not proved their case to the required standards. It is said that there is no proof that the defendants were in possession of the property suit nor had they refused to have the same sold. It is also submitted that only four people were sued yet the title produced in evidence is in the names of 10 people. No order should be made against non-parties. It is stated that this suit is resjudicata in view of the judgment in **Kadhis case No. 74 of 1996** in which similar orders were made.

I have considered the evidence and the submissions of learned counsels. Basically the plaintiffs are seeking for an order of vacant possession and sale of the suit premises. The issue which must be determined is whether there was proof that the defendants are in occupation. Secondly, whether or not all those mentioned in the title deed have been enjoined to this suit. Thirdly, there is one issue which though not pleaded, came out in the evidence hence was left for the determination of court, that is to say whether or not this suit is resjudicata. Let me begin by examining the first issue as to whether or not there was proof that the defendants are in possession of the suit premises. I have carefully examined the evidence of P.W.1 and the submissions tendered by learned counsels. It is clear that the plaintiffs have not tendered credible evidence to show that the defendants are in occupation of L.R. No. Mombasa/Block XLV/110. It was incumbent upon the plaintiffs to discharge that burden so that they could be entitled to the order of vacant possession. I am satisfied that the plaintiff's have failed to establish that fact.

The second issue is whether or not all the affected parties were enjoined to this suit. On cross-examination, P.W. 1 conceded that not all the persons named in the title deed produced in this suit as an exhibit in evidence were parties to this suit. It is trite law that no court can issue adverse orders against a party having registered proprietary interest over land unless such a person is made a party to the suit. There is no doubt that only four persons have been named as defendants in this suit yet the title in question is in the names of ten persons. This inadequacy alone disposes of this suit.

The last issue relates to an unpleaded issue. The issue is whether or not the suit is resjudicata. The 1st plaintiff (P.W.1) admitted in his evidence on cross-examination that the Chief Kadhi had heard and determined a similar dispute over the same property. P.W. 1 even produced a certified copy of the order made by the Kadhi vide Civil Case No. 74 of 1996. I have carefully considered this issue and it is clear that the Kadhi in his decision of 20/5/1997 ordered the Wakf dissolved and determined the shares of each beneficiary. He did not determine the issue of possession and sale of the property. I am therefore not convinced that the suit resjudicata.

In the end I am not convinced that the plaintiffs have not proved their case to the required standards in Civil cases. They have failed to show that the defendants are in possession. They have also failed to enjoin to this suit all the registered proprietors of L.R. No. Mombasa/XLV/110. No court can issue orders against a registered proprietor of land unless such a proprietor is enjoined to the suit and heard.

For the above reason this suit is hereby ordered dismissed with costs to the defendants.

Dated and delivered at Mombasa this 28th day of May 2009.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Mwakireti for the Defendant
and Mr. Oloo h/b Kiume Kioko for plaintiff.