



**Said Bin Seif Properties (2016) Limited & another (Suing as an administrators of the Estate of Meya Binti Salim Bin Khalfan Al- Busaidy aka Meya Salim Khalfan (Deceased)) v Director of Surveys, Ruaraka Nairobi & another (Environment & Land Miscellaneous Case 55 of 2022) [2022] KEELC 13750 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13750 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND MISCELLANEOUS CASE 55 OF 2022**

**NA MATHEKA, J  
OCTOBER 25, 2022**

**BETWEEN**

**SAID BIN SEIF PROPERTIES (2016) LIMITED ..... 1<sup>ST</sup> APPLICANT  
THELMA SALIM AL- BUSAIDY AKA THELMA LYALL & FATHIYA HAFIDH  
AL- BUSAIDY ..... 2<sup>ND</sup> APPLICANT  
SUING AS AN ADMINISTRATORS OF THE ESTATE OF MEYA BINTI SALIM  
BIN KHALFAN AL- BUSAIDY AKA MEYA SALIM KHALFAN (DECEASED)**

**AND**

**DIRECTOR OF SURVEYS, RUARAKA NAIROBI ..... 1<sup>ST</sup> RESPONDENT  
CHIEF REGISTRATION OFFICER MOMBASA DISTRICT LANDS  
OFFICE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application is dated August 25, 2022 and is brought under section 80 and 79(1)(c) of the [Land Registration Act](#) 2012, section IA, 1B and 314 of the [Civil Procedure Rules 2010](#) & section 89 of the [Civil Procedure Act](#) seeking the following orders;
  1. That this matter be certified as urgent and heard *ex parte* in the first instance.
  2. That an order be and is hereby issued directing the 1<sup>st</sup> respondent to cancel and/or nullify the entries made on file Ref No CT 12/Vol 10/93 of January 26, 2015 in its possession and to conduct a re-survey of title number Mombasa/Block XVII/1068.



3. That an order be and is hereby issued directing the 2<sup>nd</sup> respondent to cancel and/or nullify entry No 2 dated January 28, 2015 made on the green card for title number Mombasa/Block XVII/1068
  4. That an order be and is hereby issued directing the 2<sup>nd</sup> respondent to cancel and /or nullify parcel file references title number Mombasa/Block XVII/1804 and title number Mombasa/Block XVII/1805 and all entries made therein.
  5. That this honourable court be pleased to further grant such orders it deems fit and convenient to meet the ends of justice.
  6. That the costs for this application be provided for.
2. It is based on the grounds that the applicants are the administrators and beneficiaries of the estate of the late Said Bin Seif and Maya Binti Salim (both deceased) who are the registered proprietors of all that property known as title number Mombasa/Block XVII/1068 (hereinafter "The property") in half (1/2) shares. Succession proceedings in respect of the estates of both deceased(s) was concluded in the year 2014 and 2015 and the respective certificate of confirmation of grants and court order issued to the administratrix and heirs of the said estates. On the applicants' instructions and upon conducting investigations at the Mombasa Lands Office, they discovered that the property had been subdivided into two portions with the approvals for the same emanating from the county government of Mombasa acting on the instructions of the 1<sup>st</sup> respondent *vide* entry No 2 on the green card referenced as file Ref No CT 12/Vol 10/93 of January 26, 2015.
  3. That the applicants did not consent or authorize any subdivision process to be conducted on the property and in any event, at the time of the purported subdivision, succession proceedings in regards to the estates of the deceased's were pending in court. By reason of the foregoing irregular and unlawful acts by the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the applicants are apprehensive that the property may be unlawfully grabbed by unscrupulous and unknown persons ostensibly working in cahoots with the 1<sup>st</sup> and 2<sup>nd</sup> respondent and that they will ultimately be unable to transfer the said property to the heirs and beneficiaries of the applicants as ordered by the respective family courts. It is the interests of fairness and justice that this honorable court do grant the prayers sought.
  4. This court has considered the application and the supporting affidavit. The applicants are seeking orders to direct the 1<sup>st</sup> respondent to cancel and/or nullify entries made on file Ref No CT 12/Vol 10/93 of January 26, 2015 and conduct a fresh survey on title No Mombasa/Block XVII/1068. The applicant is also seeking orders to direct the 2<sup>nd</sup> respondent to cancel entry No 2 dated January 28, 2015 made on the green card of the suit property. It is the applicants case, that the 1<sup>st</sup> applicant is the beneficial owner of half of Mombasa/Block XVII/1068, whose beneficial interest was transferred to the company by virtue of an order of Kadhi Court in succession petition 10 of 2014 dated June 29, 2022. The 1<sup>st</sup> applicant holds the shares in the suit property as heirs of the estate of the late Said Bin Seif. The 2<sup>nd</sup> applicant are administrators and beneficiaries to the estate of Said Bin Seif and Maya Binti Salim who are the registered proprietors of half of plot No Mombasa/Block XVII/1068, as seen from the certificate of confirmation of grant dated October 1, 2015 in High Court succession cause No 326 of 2013. They claim that the respondents have since irregularly subdivided the suit property, into two parcels Mombasa/Block XVII/1804 and Mombasa/Block XVII/1805. The applicants have urged court to cancel the green cards of the said subdivisions.
  5. Annexure 'B' is a green card for Mombasa/Block XVII 1068 which was opened on January 28, 2015 and indicated that the suit property was registered in the names of Maya Binti Salim and Said Bin Seif as tenants in common with equal shares on May 2, 1965. The second entry on the certificate of title was



on January 28, 2015, where the suit property was subdivided on approval by the county government of Mombasa creating plot No Mombasa/Block XVII/1715 and No Mombasa/Block XVII/1716. Annexure 'G' is a green card for plot No Mombasa/Block XVII/1804 which was first opened on April 25, 2017, with entry No 1 as the registration of Maya Binti Salim and Said Binti Seif as tenants in common in equal undivided shares. While annexure 'H' is a green card for plot No Mombasa/Block XVII/1805 which was first opened on April 25, 2017, with entry No 1 as the registration of Maya Binti Salim and Said Binti Seif as tenants in common in equal undivided shares.

6. It is trite law that fraud is a serious allegation which has to be pleaded and proved to a standard above the balance of probabilities but not beyond reasonable doubt. Where fraud, is intended, there must be a clear and distinct allegation of fraud upon the pleadings. In the case of *Vijay Morjaria v Nansing M Darbar & another* (2000) eKLR, Tunoi J.A (as he then was) held as follows regarding proof of fraud:

It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

7. Order 2 rule 4 as read with rule 10 of the *Civil Procedure Rules* is of the effect that pleadings have to particularize fraud. Whether or not there is fraud or illegality is a question of evidence. This suit has been instituted by the applicants through a miscellaneous cause and evidence has been produced by way of affidavit. This is a dispute about ownership and entitlement to the land, which requires parties to bring their witnesses to court to testify; affidavit evidence will not suffice in a matter where there are rival claims as this. The applicants ought to have instituted the suit against the respondents by way of an ordinary suit so that all the issues could be ventilated before the court. A miscellaneous case is not a forum where disputes on ownership of land can be adjudicated and determined because it is restricted to affidavit evidence while such disputes require *viva voce* evidence and cross examination of witnesses.
8. In *Naimisha Somchand Shah v Resident Magistrate, Mombasa & 3 others* (2017) eKLR, Ogola J held that;

To resolve the issue of fraud, it has been stated severally that allegations of fraud cannot be dealt with by affidavit evidence. The particulars of that fraud must be pleaded and proved at a hearing with cross examination. I agree with submissions of Mr Kongere, who in support cited the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR where the court stated as follows of fraud and affidavit evidence:

“We would also wish to point out, as this court stated in *Westmon Power Kenya Limited v Frederick & another/a Continental Traders & Marketing* [2003] KLR 357, albeit in the context of an application for summary judgment, that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence.”

9. This court cannot make substantive orders from an application such as this one. The applicants ought to file a civil suit and properly address the issue of ownership of the suit property and whether they have any remedies against the respondents. The sanctity of a title to land can only be determined by way of filing pleadings and *viva voce* evidence. It follows that this court finds that notice of motion dated August 25, 2022 lacks merit and is dismissed with no order as to costs as the same was undefended.

It is so ordered.



**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER 2022.**

**N.A. MATHEKA**

**JUDGE**

