



REPUBLIC OF KENYA



KENYA LAW
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Shah & another v Dhiman & another (Environment and Land Case Civil Suit 285 of 2013) [2022] KEELC 3797 (KLR) (5 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 285 OF 2013**

OA ANGOTE, J

MAY 5, 2022

BETWEEN

MANISH GOVINDJI SHAH 1ST PLAINTIFF

SHAILESH GOVINDJI SHAH 2ND PLAINTIFF

AND

KANWAL SARJI SARJIT SINGH DHIMAN 1ST DEFENDANT

TONNY SHIMAN 2ND DEFENDANT

JUDGMENT

Introduction

1. In the Plaintiff dated 1st February, 2013, the Plaintiffs averred that until 16th August, 2010, the Defendants were the registered owners of land known as L.R. No. 209/4174, I.R 9280 (the suit property); that the Defendants charged the suit property to Habib Bank Kenya Limited and that on 9th April, 2010, the Defendants and Habib Bank Limited sold the suit property to the Plaintiffs at a consideration of Kshs. 5,000,000 and Kshs. 17,000,000 respectively.
2. The Plaintiffs averred in the Plaintiff that the agreement for sale in so far as it related to the 25 % undivided share in the suit property was executed by the 2nd Defendant as the administrator of the estate of the late Kanwal Iqbal Singh Dhiman and the duly appointed Attorney of the 1st Defendant.
3. It was averred by the Plaintiffs that the agreement authorized Habib Bank Limited to execute the transfer of the property on behalf of the Defendants; that the agreement for sale in so far as it related to the 75% undivided share in the suit property was executed by Habib Bank Limited and that the transfer of the suit property was executed by Habib Bank Limited and the Plaintiffs on 28th June, 2010 with the transfer being registered on 16th August, 2010.



4. It is the Plaintiffs' case that on 16th August, 2010, a charge in favour of I & M Bank Limited was registered against the suit property to secure a loan of Kshs. 24,000,000 advanced to the Plaintiffs and that the Plaintiffs' attempt to get vacant possession of the suit property from the 1st Defendant through eviction in CMCC No. 5923 of 2010 (Milimani) was not successful.
5. According to the Plaintiffs, in view of the Defendants' continued unlawful occupation and possession of the suit property beyond 16th August, 2010, they have been denied the use of the suit property and the monthly rent of Kshs. 500,000. The Plaintiffs have sought for the following orders;
 - a. A declaration that the Plaintiffs are entitled to vacant possession of property L. R. No. 209/4174 registered under Certificate of title Number I. R. 9280 from the 1st and 2nd Defendants.
 - b. An order be issued directing the 1st and 2nd Defendants, their agents, servants and any other persons in occupation to deliver vacant possession of property L. R. No. 209/4174 registered under certificate of title number I. R. 9280 to the Plaintiffs, failing which the 1st and 2nd Defendants, their agents, servants and any other persons in occupation of the property be forcefully evicted from the property with the assistance of a Court bailiff.
 - c. The 1st and 2nd Defendants be directed to pay the Plaintiffs mesne profits of Kshs 500,000 per month from 16th August, 2010 until and up to the date of vacant possession of the property by the 1st and 2nd Defendants, their agents, servants and/or any other persons in possession.
 - d. The 1st and 2nd Defendants be ordered to pay the Plaintiffs costs of this suit together with interest thereon at courts rates from the date of filing of suit until payment in full.
 - e. Any such other or further relief as this Honourable court may deem appropriate.
6. The 1st Defendant filed a Defence and counterclaim. In the Defence, the 1st Defendant pleaded that the purported transfer and registration of the suit property in the Plaintiffs' names was the product of fraud and misrepresentation on the part of the 2nd Defendant, Habib Bank Limited and the Plaintiffs who colluded to unlawfully dispossess the 1st Defendant the suit property.
7. The 1st Defendant averred that the Plaintiffs are non-suited; that the matter raised in the suit are res judicata and that a similar suit being CMCC No. 5923 of 2010 (Milimani) was filed by the Plaintiffs and dismissed with costs.
8. It is the 1st Defendant's case that whereas 75% of the suit property held by Kanwal Iqbal Singh Dhiman and Kanwal Surjit Singh Dhiman (the 1st Defendant) had been charged to Habib Bank Limited, the said shareholding was later varied by a deed of retirement and was split where 37 ½ was registered in favour of Kanwal Amarjit Singh Dhiman and Kanwal Arvta Singh Dhiman (donated by the late Iqbal Singh Dhiman) and 37 ½% in favour of the 1st Defendant and that 25% of the suit property registered in favour of the estate of Sadhu Singh Dhiman was free from encumbrance.
9. The 1st Defendant averred that upon the death of Sadhu Singh Dhiman (his father), a grant of probate was issued in his favour with his other brother, Kanwal Iqbal Singh (the 2nd Defendant's father) as the executors of the estate comprising the 25% of the suit property and that his co-executor, the 1st Defendant's father, died leaving him as the only surviving executor.
10. The 1st Defendant pleaded in the Defence that the inclusion of the 25% in the purported sale of the suit property to the Plaintiffs without his involvement was fraudulent, irregular and untenable there by rendering the alleged sale a nullity ab initio.



11. In the counter-claim, the 1st Defendant has prayed for a declaration that the purported sale to the Plaintiffs of the suit property was unlawful and nullity in law; an order revoking the Plaintiffs' title and an order directing the Commissioner of Lands to rectify the register and reinstate the 1st Defendant as the lawful owner of the suit property.

The Plaintiff's case

12. The 1st Plaintiff, PW1, adopted his witness statement as his evidence in chief. PW 1 informed the court that until 16th August, 2010, the Defendants were the registered proprietors of L. R. No. 209/41/74 (the suit property); that in March, 2010, the 2nd Defendant approached him and offered to sell to him the suit property and that the 2nd Defendant claimed to have the Power of Attorney to deal with the suit property on behalf of the 1st Defendant.
13. PW1 stated that on 25th March, 2010, the Defendants' advocates forwarded agreements for sale of the suit property to his advocates; that on 6th April, 2010, he paid the deposit of the purchase price of Kshs 1,700,000 to Habib Bank Limited and that on 9th April, 2010, the Defendants, Habib Bank Limited and himself executed the agreements for sale of the suit property at a price of Kshs. 5,000,000 and Kshs. 17,000,000 respectively.
14. PW 1 informed the court that the agreement for sale in so far as it related to the 25% undivided share in the suit property was executed by the 2nd Defendant as the administrator of the estate of the late Kanwal Iqbal Singh Dhiman and the duly appointed attorney of the 1st Defendant.
15. It was the testimony of PW1 that the agreement of sale in so far as it related to the 75 % undivided share was executed by Habib Bank Limited; that the Transfer of the property in their favour was also executed by Habib Bank Limited on 28th June, 2010 and registered in their favour and that the land was charged to I & M Bank Limited on the same day.
16. According to PW1, the entire purchase price was paid to the Defendants' advocates and Habib Bank Limited on 8th September, 2010 and that they are entitled to vacant possession of the suit property. In cross-examination, PW1 stated that the suit property was charged to Habib Bank limited; that he was not aware of the Assent dated 30th July, 2007 and that he was made aware of the proposed sale of the suit property by the bank by an estate agent.
17. It was the evidence of PW1 that he was informed that the bank was selling 75 % of the suit property, while the 2nd Defendant was selling 25 %; that the 2nd Defendant had a Power of Attorney from the 1st Defendant and that he did not find out the whereabouts of the donor of Power of Attorney.
18. PW1 informed the court that he knew that the suit property was registered in the name of Kanwal Iqbal Singh and Kanwal Surjit Singh as tenants in common in equal shares; that there were people occupying the suit property as at the time of the purchase and that the Power of Attorney that was in possession of the 2nd Defendant was not registered.
19. It was the evidence of PW1 that he paid the deposit of the purchase price before the agreement was executed; that no undertaking was given prior to the payment; that the transfer was made to them by the bank by private treaty and that in the whole transaction, the 2nd Defendant was acting as an administrator of the estate of his father and an Attorney of the 1st Defendant.



The Defence case

20. The 1st Defendant died before he could testify. The 1st Defendant was substituted by his daughter, DW1, who adopted his witness statement. According to the statement of the 1st Defendant and DW1, before the suit property was fraudulently registered in favour of the Plaintiffs, the same was owned as follows;
 - Kanwal Surjit Singh - 37 ½ %
 - Kanwal Iqbal Singh - 37 ½ %
 - Estate of Sadhu Singh Dhiman - 25%
21. It was the evidence of DW1 that 75% of the suit property was under a legal charge by Habib Bank Limited; that the other 25% was registered under the executors of the estate of Sadhu Singh Dhiman (the 2nd Defendant's father) and that the whole property was owned in common by the said persons.
22. It was the evidence of DW1 that the Plaintiffs colluded with the 2nd Defendant to sell the suit property; that Habib Bank Limited also conspired to sell 75 % of the suit property without notification as required by the law and that the 2nd Defendant forged documents which he used to sell the 25% of the suit property.
23. DW1 stated that the 1st Defendant was the sole executor of the 25% share in the suit property and yet he was not involved in the sale of the same; that the Defendants never signed an Assent and the Vesting Deed and that the photograph annexed on the Vesting Deed does not belong to his late father, the 1st Defendant. DW1 denied that his father DW1, signed any Vesting Deed as claimed and that his late father never appointed the 2nd Defendant to be his Attorney.
24. DW1 stated that the Assent, the Power of Attorney and the Vesting Deed the 2nd Defendant relied on to sale the land was a forgery; that the certificate of confirmation of grant in favour of the 2nd Defendant does not include the suit property and that the suit should be dismissed and the counter claim be allowed.
25. In cross-examination, DW1 admitted that the land was transferred to the Plaintiffs and charged to I & M Bank; that although 75% of the land was charged to Habib Bank Limited in 2010, the same was sold to the Plaintiffs fraudulently and that the land was sold by the bank before notifying his late father. The 2nd Defendant neither filed a Defence nor testified.

Submissions

26. The Plaintiffs' advocate submitted that CMCC No. 59 23 of 2010 was dismissed for want jurisdiction; that the Judgment that had been obtained earlier in that suit was set aside and that this suit cannot be res judicata CMCC No. 5923 of 2010.
27. The Plaintiffs' counsel submitted that being the registered owners of the suit property, the Plaintiffs are entitled to title and vacant possession of the same. Counsel relied on the provisions of Section 24 of the *Land Registration Act* and the case of *Peter Kamau Ikigu vs Barclays Bank of Kenya Limited and another* [2013] eKLR.
28. It was submitted by the Plaintiffs' counsel that the Plaintiffs purchased the suit property and obtained a transfer of the same for valuable consideration; that the transaction was conducted by advocates who appeared before Habib Bank Limited and the 2nd Defendant respectively and that the 1st Defendant has



not proved any fraud on the part of the Plaintiffs. The Plaintiffs' counsel relied on several authorities which I have considered.

29. On the other hand, the 1st Defendant's advocates submitted that whereas Habib Bank Limited had a right to sell the 75% share of the suit property to realize its security in the monies advanced, the required statutory notice of sale was not given as required by law.
30. Counsel for the 1st Defendant submitted that the bank sold the 75% share by private treaty and not by public auction; that the sale of 25 % share held by the 1st Defendant was shrouded with irregularities, fraud and misrepresentation as the 2nd Defendant forged documents purporting them to have been executed by the 1st Defendant and that the 2nd Defendant lacked capacity to transact at all in respect of the 25 % share.
31. It was submitted that the Plaintiffs participated in the fraud because they were not bothered to find out if the 1st Defendant had indeed signed a Power of Attorney; that PW1 visited the suit property and found the same occupied and that the Plaintiffs did not challenge the assertion that they used forged documents to register the suit property. Counsel relied on several authorities which this court has considered.

Analysis and Findings

32. The issues for determination in this suit are whether the suit is res judicata; whether the sale, transfer and registration of property known as L. R. No. 209/4174 (the suit property) to the Plaintiffs was done illegally, fraudulently and or by misrepresentation; and whether the Plaintiffs and the 1st Defendant are entitled to the orders they have sought in the Plaint and the counter-claim respectively.
33. The record shows that the Plaintiffs sued the two Defendants claiming for vacant possession of property known as L. R. No. 209/4174 (the suit property). However, it is only the 1st Defendant who filed a Defence and counter-claim. When the matter was mentioned on 29th May, 2017, the Plaintiffs' advocate informed the court that the 2nd Defendant had passed on, and that the Plaintiffs wished to proceed with the suit as against the 1st Defendant alone.
34. The 1st Defendant's counsel submitted that this suit is res judicata; that the Plaintiffs filed CMCC No. 5953 of 2010 which was dismissed and that in that suit, the court ordered that the suit property be reinstated in the name of the 1st Defendant.
35. The doctrine of res judicata is captured in Section 7 of the *Civil Procedure Act* and provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
36. Although the 1st Defendant has pleaded that this suit is res judicata CMCC No. 5953 of 2010, he did not avail to this court the pleadings and the Judgment of the court in that matter. Indeed, the only documents and pleadings in respect to CMCC No. 5953 of 2010 are the ones found in the Plaintiffs' bundle of documents.
37. The Plaint in CMCC No. 5953 of 2010 (Milimani) shows that Sava Sava Properties sued the 1st Defendant herein seeking for an order of eviction of the Defendant from L R. No. 209/4174. The



evidence before this court shows that on 24th December 2010, the lower court entered Judgment against the Defendant in that suit as prayed in the Plaintiff.

38. The record shows that on 10th June, 2011, the lower court, upon being moved by the Defendant vide an application dated 16th December 2010, set aside the default Judgment, together with the vesting order it had issued. The lower court went further and ordered for the “suit premises L. R. No. 209/4174 be reinstated to the Defendant.”
39. The Plaintiffs’ counsel submitted that the lower court set aside its judgment and the vesting order because it had no jurisdiction. Indeed, the Defendants have not disputed the assertion by the Plaintiffs that the Judgment was set aside because the court lacked jurisdiction. That being the case, and view of the provisions of Section 7 of the *Civil Procedure Act*, the Judgment of the lower court, which was eventually set aside, was not made by a competent court.
40. The Judgment of the lower court having been set aside, and the suit property having reverted to the 1st Defendant in terms of possession and not title, it follows that this suit is not res judicata.
41. It is not in dispute that before 16th August, 2010, the suit property was owned by Kanwal Surjit Singh (37 ½ %) (the 1st Defendant), Kanwal Iqbal Singh (37 ½ %) (deceased) and Sadhu Singh Dhiman (25%) deceased. Although none of the parties produced in evidence the charge document in favour of Habib Bank Limited, they were agreeable that 75% of the suit property was charged to Habib Bank Limited while 25% owned by Sadhu Singh Dhiman, the 2nd Defendant’s father, was not encumbered.
42. The Plaintiffs’ case is that in March 2010, the 2nd Defendant approached them and offered to sell to them the 25% of the suit property, and that the 2nd Defendant informed them that he had a Power of Attorney to deal with the property on behalf of the 2nd Defendant.
43. According to the alleged general Power of Attorney which was produced in evidence, the 1st Defendant nominated and appointed the 2nd Defendant to be his attorney and agent with full power and authority to sign all the documents, including sale agreements, on his behalf. The unregistered Power of Attorney was purportedly signed by the 1st Defendant on 24th February 2010 before Daniel Orange advocate.
44. The need for the 2nd Defendant to acquire a Power of Attorney to sell the suit property was informed by the fact that other than the 1st Defendant being the owner of 37 ½ % of the suit property, which portion had been charged to Habib Bank Limited, he was the sole executor of the Will of Sadhu Singh Dhiman, the 2nd Defendant’s father (deceased) and owner of 25% shares in the suit property which was not encumbered.
45. Other than the Power of Attorney which the 2nd Defendant used to sell the 25% share of the suit property to the Plaintiffs, the 2nd Defendant also had in his possession “the Vesting Deed” dated 28th June, 2010 which was registered against the title on 16th August 2010.
46. According to the Vesting Deed, the same was entered into between the 1st Defendant and the 2nd Defendant. The “Vesting Deed” acknowledged that the 1st Defendant was the sole remaining executor of the estate of the late Sadhu Singh Dhiman. In the Vesting Deed, it is purported that the 1st Defendant, as the executor of the WILL of Sadhu, assented to the vesting of the 25% of the suit property to the 1st Defendant and the 2nd Defendant as tenants in common in equal shares.
47. Armed with the Power of Attorney and the Vesting Deed, the 2nd Defendant entered into an agreement dated 9th April, 2010 with the 1st Plaintiff “as administrator of Kanwal Iqbal Singh Dhiman and the duly appointed Attorney of Kanwal Surjit Singh of 25% undivided share of L.R. No. 209/4174.



48. The 1st Defendant denied having signed the Power of Attorney. The 1st Defendant also denied that the 2nd Defendant was the administrator of the estate of the late Sadhu Singh Dhiman who owned the 25 % of the suit property that was not encumbered. The 1st Defendant also denied having signed the Vesting Deed, which documents the 2nd Defendant used to sell 25 % of the suit property to the Plaintiffs.
49. In his report, the document examiner stated that having examined and compared the signature of the 1st Defendant on the Power of Attorney dated 24th February, 2010 with his specimen signature, the signature on the Power of Attorney was written in different style and formation compared to the specimen signatures of the 1st Defendant.
50. The evidence by the 1st Defendant that he neither signed the Power of Attorney nor the Vesting Deed authorizing the 2nd Defendant to deal in the 25% share of the suit property was not rebutted by the Plaintiffs and the 2nd Defendant. In fact, the Plaintiffs proceeded with the suit against the 1st Defendant alone despite the serious allegations of fraud that had been raised by the 1st Defendant as against them and the 2nd Defendant.
51. Considering that the evidence of the 1st Defendant that he neither signed the Power of Attorney dated 24th February, 2010 and the Vesting Deed of 28th June, 2010, and the 2nd Defendant and the Plaintiffs having not rebutted this assertion, it is the finding of this court that the 2nd Defendant did not have authority to sell the 25% of the suit property to the Plaintiffs or at all.
52. Indeed, the Plaintiffs cannot argue that they were innocent purchasers for value, and should therefore be protected by this court. I say so because the Plaintiffs did not carry out any due diligence to find out if indeed the 1st Defendant, who was still alive as at the time they purported to buy the 25 % share of the suit property, had given the 2nd Defendant authority to sell the suit land.
53. I will now turn on the issue of whether the sale of 75% of the suit property which was charged to Habib Bank Limited was lawful. The sale agreement of 9th April, 2010 shows that Habib Bank Limited sold to the 1st Defendant 75% of undivided share of L. R. No. 209/4174. The agreement shows the purchase price as Kshs. 17,000,000. The Plaintiffs produced in evidence the transfer by chargee dated 28th June, 2010 between themselves and Habib Bank Limited. The transfer was registered on 16th August, 2010.
54. Although the 1st Defendant has pleaded in the counter-claim that the sale of 75% of the suit property by Habib Bank Limited to the Plaintiffs should be nullified on the ground that the Bank did not issue him with any notification of sale, the 1st Defendant did not join the bank as a party in the counter claim.
55. It is trite that a party cannot be condemned unheard. Habib Bank Limited having sold the suit property in exercise of its statutory power of sale, and the said property having been transferred to the Plaintiffs and charged to I & M Bank Limited, it follows that the two banks should have been joined in the suit. Having not joined Habib Bank Limited and I & M Bank Limited in the counter claim, the court declines to cancel the sale of 75% share of the suit property to the Plaintiffs.
56. The claim by the Plaintiffs for mesne profits was not proved by the Plaintiffs. Indeed, no report was filed by an expert to show that the rent payable in respect to the suit property was Kshs. 500,000 per month. The same is not awarded.
57. That being the case, both the Plaintiffs' suit and the 1st Defendant's counter-claim partially succeed as follows;



- a. A declaration be and is hereby issued that the Plaintiffs are entitled to 75% share of L. R. No. 209/4174 registered under I. R. 9280, while the estate of Sadhu Singh Dhiman is entitled to 25% share of L. R. No. 209/4174.
- b. Parties are at liberty to apply on how the suit property will be shared in the ratio of 75:25% between the Plaintiffs and the 1st Defendant.
- c. Each party to pay its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH MAY, 2022

O. A. Angote

Judge

In the presence of;

Ms Ang'awa for Mr. Havi for the Plaintiffs

Mr. Nduati for the 1st Defendant

Court Assistant – Caroline Kajuju

