



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E085 OF 2020

RAZIA BEGUM SHERALLY.....1ST PLAINTIFF

JAMEEL SHERALLY.....2ND PLAINTIFF

MURAD SHERALLY.....3RD PLAINTIFF

=VERSUS=

SAIKA JAMIL MUGHAL.....1ST DEFENDANT

HAIYKAL JAMIL MUGHAL.....2ND DEFENDANT

FAISAL JAMIL MUGHAL.....3RD DEFENDANT

SAMINA JAMIL MUGHAL.....4TH DEFENDANT

SHELLY MOHAMED.....5TH DEFENDANT

RULING

1. The plaintiffs initiated this suit through a plaint dated 24/8/2020. They contend that the 1st plaintiff, Razia Begum Sherally, is the Widow of the late Mohamed Ulias Mughal [also known as *Mohamed Ullays* and also known as *Mohamed Ulias Niaz*], while the 2nd and 3rd plaintiffs are children of the said couple. They further contend that the 5th defendant, Shelly Mohamed, is the Widow of the late Mohamed Jamil Mughal [also known as *Jamail Mughal*] , who was a sibling of the late Mohamed Ulias Mughal. The 1st to 4th defendants are children of the late Mohamed Jamil Mughal.

2. It is the case of the plaintiffs that Mohamed Ulias Mughal owned Land Reference Number 209/3597 situated in South B, Nairobi. They add that the two deceased siblings co-owned Land Reference Number 209/3596, also situated in South B, Nairobi, as tenants-in-common.

3. The plaintiffs allege that the late Mohamed Jamil Mughal fraudulently transferred Land Reference Number 209/3597 into his name without the knowledge of the late Mohamed Ulias Mughal. Lastly, they contend that they have learnt that the defendants are planning to sell the two properties without the requisite succession documents and without consulting the family of the late Mohamed Ulias Mughal.

4. Consequently, they seek the following verbatim reliefs through the plaint dated 24/8/2020:

a) A declaration do and hereby issues stopping the defendants their representatives'/agents from illegally selling, transferring or interfering and/or registering any part of or the whole of Land Reference Number 209/3596.

b) A declaration do and hereby issues that the transfer of Land Reference Number 209/3597 from the late Mohamed Ulias Mughal to Jamil Mughal was fraudulent and therefore null and void.

c) A declaration do and hereby issues that Jamil Mughal's conduct of transferring to himself the suit property was unprocedural and illegal and therefore null and void.

d) A declaration do and hereby issues that the defendant's conduct of planning to sell to herself the suit property to the exclusion of the plaintiffs would violate the plaintiffs' right under article 27 and 40 of the Constitution.(sic)

e) A declaration do and hereby issues stopping the defendants their representatives'/agents from illegally selling, transferring or interfering and/or registering any part of or the whole of Land Reference Number 209/3597 and Land

Reference Number 209/3596.

f) An order do and hereby issue revoking the transfer of Land Reference Number 209/3597 from the late Mohamed Ulias Mughal to Jamil Mughal.

g) The defendants be condemned to pay the costs of this suit.

5. Simultaneous with the plaint dated 24/8/2020, the plaintiffs brought an application dated 24/8/2020, seeking the following interlocutory injunctive orders:

a) Spent

b) Pending the hearing and determination of this suit, an injunction order do and is hereby issued against the defendant their agents/representatives from transferring, leasing, parting way with, developing or otherwise dealing in the piece of land known as Land Reference No. 209/3596 located in South B in Nairobi.

c) Spent

d) Pending the hearing and determination of this application and suit, an order of inhibition do and is hereby issued directed to the Land Registrar in Nairobi, stopping them from registering and/or transferring the pieces of land known Land Reference No. 209/3596 and Land Reference No. 209/3597.

e) Spent

f) Pending the hearing and determination of this suit, an order of injunction do and hereby issue against the defendants from barring, stopping, excluding or otherwise interfering with the plaintiffs' right to access or utilise any and all parts of Land Reference No. 209/3597.

g) Cost of this application be provided for.

6. The said application is one of the two items falling for determination in this ruling. The other item falling for determination in the ruling is the 1st, 2nd and 3rd defendants' preliminary objection dated 27/10/2020 in which the three defendants object to this suit and seek an order striking the suit out on the following verbatim grounds:

1) The application and entire suit is incompetent and res judicata as it offends the provisions of Section 7 the Civil Procedure Act Cap 21.

2) The entire suit is incompetent and sub judice as it offends the provisions of Sections 6 and 8 of the Civil Procedure Act Cap 21.

3) That the court has no jurisdiction to hear, entertain or determine this suit.

4) That the application is premature, bad in law and offends mandatory provisions of the Law.

5) That the suit is not properly before the court and the omission is fatal to its validity.

6) That the plaintiff/applicants have no capacity and no locus standi to institute this suit. The suit properties are in respect of the estates of MOHAMMED JAMIL MUGHAL and MOHAMMED ULIAS NIAZ who are the registered owners of the suit property land reference number 209/3597 and 209/3596 situate at Nairobi South B.

7) That the entire suit is fatally defective and the plaintiffs have no lawful cause of action against defendants.

8) That the application is otherwise frivolous, vexatious and an abuse of the process of this honourable court.

7. The application was supported by a supporting affidavit sworn on 24/8/2002 by Racia Begum Sherally. The defendants opposed the application through a replying affidavit sworn on 27/10/2020 by Mohamed Hyekal Mughal. The application and the preliminary objection were canvassed through brief oral submissions in the Virtual Court on 22/2/2021.

8. I have considered the preliminary objection dated 24/8/2020 and the application dated 24/8/2020. Because the preliminary objection contests the jurisdiction of this court to entertain this suit and challenges the *locus standi* of the plaintiffs to bring the suit in the manner they have brought it, I will dispose it first before disposing the application.

9. The preliminary objection raises two key issues: (i) Whether this suit is barred under **Section 7** of the **Civil Procedure Act** by dint of the fact that the matter in it have been directly and substantially in issue in Nairobi ELC 87/2007 and Nairobi ELC 88/2007 [Formerly Nairobi HCCC No 87/2007 and 88/2007 respectively]; and (ii) Whether the plaintiffs collectively lack *locus standi* to initiate the proceedings herein in the manner they have initiated this suit. I will analyse the two issues sequentially in the above order.

10. I have perused the record before me in its entirety. What emerges from the record is that Land Reference Number 209/3596 was registered in the names of Mohamed Jamil and Mohamed Ullays as tenants-in- common in equal shares on 16/4/1986 at a consideration of Kshs 650,000. It remains so registered, going by the documents presented to the court at this stage. Land Reference Number 209/3597 was registered in the name of Jamail Mughal as sole proprietor on 4/11/1971 at a consideration of Kshs 8,000. It remains so registered, going by the documents presented to the court at this suit.

11. Secondly, it does emerge that in 2007, Mohamed Jamil Mughal sued his sibling, Mohamed Ulias Niaz in Nairobi HCCC No 87 of 2007 [which was later designated as Nairobi ELC No 87 of 2007] seeking, among other reliefs, an order declaring him as the sole proprietor of Land Reference Number 209/3597. He also sued the same sibling in Nairobi HCCC No 88 of 2007 [which was later designated as Nairobi ELC No 88 of 2008] seeking among other reliefs, a declaration that Mohammed Ulias Niaz held Land Reference Number 209/3596 as co-owner with him. On 2/10/2009, Onyancha J consolidated the two suits and designated HCCC 88 of 2007 as the Lead File. Mr Mohamed Ulias subsequently died in 2014. On 14/4/2015 Gitumbi J recorded a consent substituting the deceased defendant with Faiza Parveen Mughal. The consent further provided as follows:

“4. That the plaintiff be and is hereby the sole proprietor of the property known as LR No 209/3597 situated at Nairobi South B (sic).

5. That the defendant do give vacant possession of LR No 209/3597 within 30 days from today and in default eviction to issue.

6. That the entire suit herein be marked as settled with no orders as to costs”

12. Attempts by the 1st plaintiff in the present suit to set aside the above consent orders were declined by Komingoi J on 5/11/2019. The 1st plaintiff subsequently filed a notice of appeal against Judge Komingoi’s decision.

13. What therefore emerges from the foregoing is that the questions of

ownership of the two properties have been the subject of litigation in the two preceding consolidated suits involving the two siblings. It is therefore a blatant violation of Section 7 of the Civil Procedure Act for the plaintiffs herein to initiate fresh proceedings and seek a resolution of the same questions through a fresh suit. To that extent, I agree with the defendants in this suit that this suit is an abuse of the process of the court and cannot stand. If the estate of Mohamed Ulias Mughal [also known as *Mohamed Ullays Mughal* and also known as *Mohamed Ulias Niaz*] is aggrieved with the consent recorded before Gitumbi J and the subsequent ruling by Komingoi J, the proper redress forum is an appeal, not the present suit. My finding on the first question, therefore, is that this suit is barred under **Section 7** of the **Civil Procedure Act**.

14. On the second issue in the preliminary objection, the plaintiffs collectively brought this suit seeking collective reliefs. They did not plead that they were suing on behalf of the estate of Mohamed Ulias Mughal. They did not exhibit any joint grant empowering them to jointly institute this suit on behalf of the estate of Mohamed Ulias Mughal. They nonetheless seek reliefs on behalf of the late Mohamed Ulias Mughal, among them:

“(b) A declaration do and hereby issue that the transfer of Land Reference No 209/3597 from the Late Mohamed Ulias Mughal to Jamil Mughal was fraudulent and therefore null and void.”

15. My reading of the plaintiffs’ pleadings is that this is a suit on behalf of

the estate of Mohamed Ulias Mughal. A suit of this nature can only be instituted by the duly appointed representative(s) of the estate. The three plaintiffs have not stated their representative locus and have exhibited any joint grant jointly appointing them to jointly represent the estate. In the circumstances, the court agrees with the objectors that to the extent that the plaintiffs do not have any joint grant conferring upon them a joint mandate to initiate the present proceedings, this suit is incurably defective.

16. The net result is that the preliminary objection by the 1st, 2nd and 3rd defendants has merit and is upheld. The suit herein is struck out on the above grounds. With that finding on the preliminary objection, there will be no further pronouncements on the application dated 24/8/2021 because its fate is the same as the fate of the suit herein.

17. In the end, the suit herein is struck out for being a blatant violation of **Section 7** of the **Civil Procedure Act** and for lack of joint *locus standi* on part of the three joint plaintiffs. The plaintiffs shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Misati for the 1st, 2nd and 3rd Respondents

Court Assistant: June Nafula