



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CASE NO. 160 OF 2011

IN THE MATTER OF THE ESTATE OF SHEE MOHAMED ATHMAN (DECEASED)

JUDGEMENT

The late Shee Mohamed Athman died on 8.10.2003 at Matondoni in Lamu County. His two children Zahara Shee Mohamed and Mohamed Shee Bin Mohamed applied for Letters of Administration Intestate. A grant was issued on 25.11.2014. On 2.2.2015 an application for the confirmation of the grant was filed. Bonifus Ngugi Chege raised an objection on the ground that he purchased one of the deceased's properties namely Plot No. Lamu/Hindi Magogoni/758. Directions were given that the objection be determined by way of oral evidence.

The objector testified that he bought the suit land from the deceased in 2001. He got information from his friend Geoffrey (PW2) that the deceased had informed David Munene (PW4) that he was selling his land. The objector met David Munene and they went to the deceased's home together with the objector's father. They met the deceased's daughter Zahara Shee as the deceased had travelled. Upon his return the objector bought the land for Kshs.50,000/=. He paid a deposit of Kshs.30,000/= and the balance was to be paid later. A sale agreement was drafted at a cyber cafe and the deceased also signed. The agreement was later taken to the Kadhi in Lamu who also signed as a witness. The deceased did not understand English and another agreement was drawn in Kiswahili.

It is the objector's evidence that at the time of sale there was no title deed. The deceased only had an allotment letter. The agreement was taken to the settlement trustee's office and he was allowed to pay for the plot. An allotment letter was released in 2005. He informed Zahara about it but was notified that the deceased had passed on. He went to the public trustee's office but the public trustee died in 2009. He realized that the deceased's family was avoiding him. He later came to find out that this succession cause had been filed. The area assistant chief gave him a letter when he went to the public trustee. After buying the property he took possession and has been living on the land. He did not go to the Land Control Board.

PW2 GEOFFREY GATHUKU NJUGUNA informed the court that David Munene had told him that the land was being sold. The objector had told him that he was looking for land. He referred the objector to David Munene. He did not witness the sale agreement. PW3 AHMED MOHAMED LAUSIN is the assistant chief of Hindi Magogoni sublocation in Lamu County. On 8.2.2011 the objector went to his office and showed him the sale agreement. He wrote a letter to assist the objector to go to the public trustee. The objector is living on the land. PW4 DAVID MUNENE IRERI lives on Plot No. 579 which neighbours the suit land. One day he heard the deceased slashing at his land. He went there and the deceased told him that he was selling the land. The objector heard that PW4 had been told that the land was on sale. Zahara had told him that the land was being sold for Kshs.60,000/=. He took the objector and his father to the deceased's home but they did not get him. The objector later went to the chief's

office on the issue and paid Kshs.30,000/=. He was not present. The objector is occupying the land and built two houses. He has also planted casuarina trees.

DW1 LUFTA SHEE MOHAMED is the deceased's daughter. She testified that the deceased did not sell the land and that the signature on the sale agreement is not that of the deceased. If their father sold the land he would have told them. Their father did not go to the Land Control Board. By the time he died there was no sale agreement. DW2 MOHAMED SHEE MOHAMED is the 2nd petitioner and the deceased's son. In 1984 he used to work as a forest officer. He planted trees on the land and built a temporary house that was to be used by a care taker. At one time the objector's father by the name Samuel who is their neighbor at the suit premises asked the deceased to give a portion of land to the objector to cultivate. Samuel was a friend to the deceased. DW2 objected to that arrangement. However, his late father later allowed the objector to cultivate the land. Samuel's land is on the other side of the road and they are neighbours. The land was not sold and there was no sale agreement. The objector has built a house on the land.

DW3 ZAHARA SHEE MOHAMED testified that she is the deceased's first born child. Her evidence is that the deceased did not sell the land. The family had planted trees on the land and built a house. The objector took over the house as the deceased allowed him to live on the land. It is the objector's father who pleaded with the deceased to allow the objector to live on the land. Before her father died she was given a power of attorney by the deceased on all of his properties.

Counsel for the objector submit that the suit land was sold to the objector. The contention that the objector was allowed by the deceased to live on the land on humanitarian grounds is not true. The deceased signed the sale agreement and there is no evidence that he did not sign voluntarily. The petitioners could not have watched the objector putting permanent structures on the land without questioning him. The deceased was the owner of the land. He had the capacity to sell. It is further submitted that the current Registration of Land Act No. 3 of 2012 only recognizes spousal consent in land transaction. The petitioners herein are the deceased's children.

It is further submitted that section 6 of the Land Control Board Act Cap 302 calls for consent in transactions involving agricultural land. The minister in charge of land issues is supposed to declare an area as a land control zone through a Kenya gazette. There is no evidence that the suit land falls within the land controlled zone. When the land was bought, there was no title deed and the land was unregistered. There was therefore no need for any consent from the Land Control Board. The allotment letter was issued after the demise of the deceased. Even if the consent of the board was required section 8 of the Land Control Board Act empowers the High Court to extend time for the application of the consent. The land was duly sold and the objector has been in possession for more than fifteen years. The objection is merited and the suit land should be distributed to the objector.

On his part, counsel for the petitioners maintains that the only issue being raised by the objection is whether the deceased sold Plot No. Lamu/Hindi Magogoni/578 to the objector. It is submitted that at the time of sale Lamu area came within the application of the Land Control Act. The Act applies whether the land is registered or not. The defence evidence is to the effect that if the deceased had sold his land he could have informed his children. Section 6 of the Land Control Act requires all transactions involving agricultural land to obtain a consent from the Land Control Board. No such consent was obtained and therefore the alleged agreement is void. There is no evidence that the objector applied for the extension of the time. The only remedy is section 7 of the Land Control Act for the objector to claim his money if it is proved that he paid that amount. Counsel relied on the case **ONYANGO & ANOTHER VS LUWAYI [1986] KLR 513** where the court held that if an application for consent to the Land Control Board is not made within six months then the sale agreement is of no effect.

The objection herein raises the issue as to whether Plot Number Lamu/Hindi Magogoni/758 was sold to the objector during the deceased's lifetime. The objector's evidence is that he bought the land from the deceased. He produced two sets of sale agreement dated 30.5. 2001 to galvanise his case. He also maintains that he has been in possession of the suit land and has built two houses on the land. He paid the purchase price of Kshs.50,000/=.

On their part, the petitioners maintain that the land was not sold to the objector. The objector was simply allowed to occupy the land. There was no sale agreement. No consent of the Land Control Board was obtained. The objector was allowed to occupy the deceased's house on the land.

Counsel for the objector maintains that the deceased signed the sale agreement voluntarily. There was no restriction on the part of the deceased to sell his property. The objector's evidence is that the sale agreement was prepared in a cyber cafe. It was later taken to the Kadhi for witnessing. The deceased could not read the English version. A second agreement was done in Kiswahili.

I have read the two agreements. The English version does not give the purchase price. It is evident from the evidence that the parties did not appear before the Lamu Kadhi for witnessing. The agreement was prepared elsewhere and taken to the Kadhi's Court for stamping. The name of the Kadhi who allegedly signed the agreement is not stated. Although the objector's father was mentioned to have gone with the objector to the deceased in relation to the sale of the land, he did not sign the sale agreement. None of the witnesses signed the sale agreement. It is highly doubtful that the objector and the deceased sat in a cyber cafe, signed the agreement and took it to the Kadhi's Court for witnessing without any other person being present. The agreement was not drawn by the Kadhi.

According to the objector, he paid a deposit of Kshs.30,000/= . It is not indicated when the deposit of Kshs.30,000/= was paid. The balance of Kshs.20,000/= was paid on the date of signing the agreement. The petitioners maintain that the deceased did not sign the purported agreement. Although the signatures on the sale agreement were not subjected to analysis by a handwriting expert, the two signatures on the English and Kiswahili version of the agreement seems to be different. Apart from that, there is the obvious fact that the deceased died on 10.2.2009. The agreement was signed in May 2001. For all those seven or eight years, there was no mention of a sale agreement. There was no indication that the property had been sold. According to the objector, he took the sale agreement to the settlement Trustee's office in 2005. From 2001 upto 2005 nothing happened. The deceased did not tell his children that he had sold the land. The objector was in occupation but the response is that he was allowed by the deceased to occupy the land since the objector's father had made such a request.

There is the issue of lack of consent from the Land Control Board. This issue is grounded on the assumption that there was a valid sale agreement. According to the objector's counsel, there is no evidence that Lamu County was a controlled area falling within the provisions of Chapter 302, Laws of Kenya. It is further submitted that the court can extend the time for obtaining the consent. On his part, counsel for the petitioners maintain that if there was sale of the land, it was a controlled transaction and the Land Control Board's consent was necessary.

The Land Control Act does not give a schedule of the areas the minister in charge of land brought under the control of the Act. The general presumption has been that the Act operates countrywide and all dealings in agricultural land come within the control of the Act. My finding is that all dealings in agricultural land in Lamu County were affected by the operations of the Land Control Act. A consent had to be obtained in dealings involving agricultural land.

Section 6 of the Land Control Act states as follows: -

“(1) Each of the following transactions –

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with an agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a

private company or co-operative society which for the time being owns agricultural land situated within a land control area,

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

The objector concedes that no consent was obtained. The alleged sale agreement was entered into in May 2001. No application to the Land Control Board was made. The fact that there was no title deed cannot be a reason not to seek the Board's consent. According to PW1, Lufta Shee Mohamed's witness statement, she visited the settlement office at Lamu on 4.4.2012 and paid the outstanding sum of Kshs.5,000/= and was issued with a receipt. It is not clear to me as to why the objector could have paid Kshs.50,000/= and fail to pay the settlement fund and have the property discharged all that time. The objector did not inform the court that he made any payments to the Settlement Fund Trustees.

The requirements of section 6 of Cap 302 were mandatory. The submissions by counsel for the objector that under section 28 of the Registration of Land Act 2012 only spousal consent is required cannot hold. The transaction was done in 2001 and the Registration of Land Act No. 3 of 2012 cannot apply as it was enacted after the deceased's death.

There are plenty of cases relating to the issue of lack of consent from the Land Control Board. In the case of **SIMIYU V WATAMBAMALA, Civil Appeal No. 34 of 1984 KLR [1985] 852**. It was held that due to lack of consent in a controlled transaction, the sale agreement became void and the buyers could only seek the recovery of the purchase price. Similarly, in the case of **ONYANGO & ANOTHER V LUWAYI, (1986) KLR 513**, it was held by the Court of Appeal that owing to the failure to obtain the consent of the Land Control Board within six (6) months, the sale transaction became void. In the case of **KARURI V GITURU 1881 [KLR] 247**, the Court of Appeal held that the provisions of the Land Control Board Act are of an imperative nature, there is no room for the application of any Doctrine of Equity to soften its harshness.

Given the pleadings herein, I do find that if there was any sale agreement between the objector and the deceased, then such an agreement is void due to lack of consent from the Land Control Board. Although section 8 (1) of the Land Control Act empowers the court to extend the six months period, this cannot happen as the registered owner is now deceased. My finding on this issue is that the deceased did not sell the land to the objector. Apart from the purported sale agreement, there is no other evidence to show that there was any sale of land. No transfer was signed. No letter was written by the deceased to the Settlement Fund Trustees informing them about the sale of the land. The sale agreement was not witnessed by any independent party. PW3, the area chief simply wrote a letter to the public trustee. He did not witness the sale agreement. It was not seen by anyone else from 2001 upto 2009. The petitioners were not aware of the alleged sale agreement. Even if there was a sale agreement, I do find that the same is void due to lack of consent from the Land Control Board. The transaction was controlled. Section 22 of the Land Control Act takes effect and the objector's occupation of the land is deemed to be a criminal offence.

I am satisfied that Plot number Lamu/Hindi Magogoni/578 is part of the deceased's estate. The objection lacks merit and is hereby dismissed with costs. The summons for the confirmation of the grant dated 2.4.2015 is hereby granted as prayed. A certificate of confirmed grant to issue.

Dated and delivered in Malindi this 2nd day of February, 2017.

S.J. CHITEMBWE

JUDGE