



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO 12 OF 2012

IN THE MATTER OF: ARTICLES 22 (1) (2) (3) (4) 23, 40(1), 47 AND 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAW OF SUCCESSION ACT, CAP 166 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 6, 8 AND 22 OF THE LAND CONTROL ACT, CAP 301 LAWS OF KENYA

AND

IN THE MATTER OF: PLOT NUMBER MALINDI PORTION NO 1757

AND

IN THE MATTER OF: PLOT NUMBER GEDE/MAJIMBONI/162

AND

IN THE MATTER OF: THE ESTATE OF GREMMO GIVANNI (DECEASED)

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)**

HIGH COURT PRACTICE AND PROCEDURE RULES 2006

AND

IN THE MATTER OF: THE ADVOCATES ACT CAP 16 LAWS OF KENYA

BETWEEN

DAVIDE GRAEMMO.....1ST PETITION

DANIELE GRAEMMO.....2ND PETITION

SARA GRAEMMO.....3RD PETITION

AND

MELINA BPRA.....1ST RESPONDENT

REGISTRAR OF TITLES MOMBASA.....2ND RESPONDENT

LAND REGISTRAR KILIFI.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

OMAR SALIM ABDALLA.....5TH RESPONDENT

LILY K. MUSINGA

WILLIAM O. WAMEYO

JACK MATHEKA.....6TH RESPONDENT

RULING

1. By a Petition dated and filed herein on 8th October 2012, Davide Gremmo, Daniele Gremmo and Sara Gremmo (the Petitioners) pray for:

a) A declaration that the letter of consent serial number 393950 dated 11th February 2010 is null and void ab initio;

b) A declaration that the transfer giving one ½ share in Gede/Mijamboni/162 to the 1st Respondent and registered on 1st March, 2010 at Kilifi Land Registry by the 3rd Respondent is null and void for fraud;

c) An order that the 3rd Respondent do forthwith rectify the register for Gede/Mijamboni/162 and re-instate the name of Giovanni Gremmo;

d) A declaration that the Indenture of conveyance dated 19th March 2010 giving one ½ share in Malindi Portion No. 1757 of the freehold interest therein to the 1st Respondent and registered on 1st March 2010 at Mombasa Land Registry by the 2nd Respondent is null and void for fraud;

e) A declaration that the Indenture of conveyance that gave rise to the subject matter of the search issued by the 2nd Respondent dated 16th November 2010 which certifies that the 5th Respondent is the registered proprietor of the entire freehold interest in Malindi Portion No. 1757 at Mombasa Land Registry is null and void for fraud;

f) An order that the 3rd Respondent do forthwith rectify the register for Malindi Portion No. 1757 and reinstate the name of Giovanni Gremmo;

g) Any other relief that this Honourable Court may deem fit to grant; and

h) Costs

2. Those prayers arise from the Petitioners' contention that they were the children of the late Giovanni Gremmo who, before his death on 18th December 2009, was the registered proprietor of the properties known as Gede/Mijamboni/162 and Portion No. 1757, Malindi. The Petitioners aver that on the death of their father, their mother Liana Tamburelli was appointed the Administrator of the deceased's estate vide a grant issued in *Malindi High Court Succession Cause No. 23 of 2010*.

3. The Petitioners further aver that after the grant of the Letters of Administration, it transpired that the deceased had allegedly made an 'inter vivos' gift of ½ undivided share in both properties respectively to the 1st Respondent herein by a transfer dated 19th May 2009 purportedly executed by the deceased on 19th May 2009 in the presence of William O. Wameyo and Lily Musinga Advocates practicing under the Law Firm named herein as the 6th Respondent.

4. The Petitioners contend that the aforesaid transfer and conveyance were fraudulent as on the 19th May 2009, the deceased had only gone to the 6th Respondent firm to sign a sale agreement for a plot known as Chembe/Kibabamshe/366 and that he never gave any instructions to the 6th Respondent for the fraudulent transfers which were done after the death of the deceased.

5. As part of their response to the application and by a Notice of Preliminary Objection dated 31st May 2019, Musinga & Company Advocates (the 6th Respondent) have objected to the Petition on the grounds that:

1) The Petitioners herein lack the locus standi to institute this Petition as the Certificate of Confirmation of grant issued to one Liana Tamburelli on the 17th December 2010 was revoked by the High Court on the 21st February 2019.

2) This Honourable Court lacks the jurisdiction to entertain this Petition as pleaded and duly filed.

3) *The Petition does not raise any legitimate Constitutional issues that warrants the attention of this Honourable Court.*

4) *The Petition be summarily struck out with costs to the Respondent.*

6. I have perused the objection and the submissions filed thereon by the Learned Advocates for the respective parties herein. The legal parameters for what is known as a Preliminary Objection in this region were long settled in ***Mukisa Biscuit Manufacturing Company Ltd – vs- West End Distributors (1969) EA 696*** where Law JA stated as follows: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

7. Cautioning against the abuse of practice by taking out all sorts of matters as Preliminary Objections in the ***same Mukisa Biscuits Manufacturing Case (Supra)***, Sir Charles Newbold JA stated thus: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. The instant matter before me was filed by the Petitioners on 8th October 2012. The 6th Respondent did not however file a response thereto until some six years later on 8th May 2018. In the said response, the 6th Respondent asserts that the late Giovanni Gremmo appeared before Mr. Wameyo Advocate and voluntarily transferred the ½ undivided share of the suit properties to the 1st Respondent.

9. While admitting that they lodged the documents of transfer before the Kilifi Land Control Board in February 2010 after the deceased's death, the 6th Respondent asserts that they only came to know of the late Giovanni's death in late 2010 when the transaction assumed a criminal dimension after the 1st Respondent was arrested and charged with forgery.

10. At paragraphs 39 to 41 of the Response to the Petition, the 6th Respondent lays the basis of the Preliminary Objection before me as follows: -

“39. Furthermore, this matter is premature, ill-conceived and unprocedural since the Petitioners lack the locus standi to institute this claim by masquerading as the sole beneficiaries of the estate of the late Giovanni Gremmo in view of the fact that the succession matter number 78 of 2010 is still pending before the High Court in Malindi.”

40. In hindsight, their belated and quixotic attempt to strike out the 1st Respondent's objection proceedings to the confirmation of the said grant which forms the entire premise of this suit was summarily dismissed by the High Court on the 16th of February 2016 where the Court recognized the 1st Respondent as a common law wife to the late Giovanni Gremmo.

41. In light of this conscious and material non-disclosure the Petitioners are guilty of approaching this Honourable Court with unclean hands hence unworthy of the subsequent orders sought in their claim.

11. As it were, the pleadings and the decision made on 21st February 2019 in the said ***Malindi High Court Succession Cause No. 78 of 2010*** have not been availed to this Court. Whatever the decision, I did not think that the determination of the Succession matter would on its own resolve the ownership of the disputed parcels of land.

12. As I understood it, the Petitioners contention herein is that the ½ share of the suit properties herein were transferred to the 1st Respondent- Melina Bora by way of fraud and in particular through the forgery of the signature of their deceased father Giovanni Gremmo. It is the Petitioners' case that there was fraud and that the three named Advocates in the 6th Respondent Law Firm drew and witnessed the execution of the transfer documents in cahoots with the 1st Respondent while meddling with the estate of the deceased.

13. The 6th Respondents on its part partially admits presenting some transfer documents to the Kilifi Land Control Board and I did not think that the mere declaration of the 1st Respondent as a common law wife of the late Giovanni Gremmo would in any way resolve the question as to whether the deceased had during his lifetime transferred the ½ share of the suit properties to herself.

14. While indeed the three Petitioners herein may not be the sole beneficiaries of the deceased's estate, it is my considered view that as such beneficiaries they have sufficient interest in the suit properties which are acknowledged to have belonged to their father at the time of his death. Those rights are in my view capable of protection as rights to property under Article 40 of the Constitution.

15. In this respect, Article 22(1) of the Constitution stipulates that:

“Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or is threatened.”

16. Accordingly, I was not satisfied that there was any merit in the Preliminary Objection dated 31st My 2019 and or that it is capable of disposing of this suit. The same is dismissed with costs to the Petitioners.

Dated, signed and delivered at Malindi this 25th day of September, 2020.

J.O. OLOLA

JUDGE