



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

CASE NO. 213 OF 2013

NOORFATMA MOHAMED HAJI ABDULLA

ABDULLA MOHAMED HAJI ABDULLA.....PLAINTIFFS

- VERSUS -

ASLAM MOHAMED HAJI ABDULLA.....DEFENDANT

J U D G M E N T

1. By a Plaint dated 18th September 2013 and filed on 25th September 2013, the Plaintiffs instituted this suit against the Defendant. They have pleaded that their father and uncle, Mohamed Haji Abdulla Ebrahim and Sidiq Haji Abdulla (both deceased) were registered owners as tenants in common in equal undivided shares of the property comprised in Title No. Mombasa/Block XVII/1039. This is a family dispute as the Defendant is a brother to the Plaintiffs who are the parties listed in the Plaint. It is further pleaded that upon the demise of Mohamed, his half share in the suit property was transmitted to and held by the Plaintiffs' mother Sairabanu Mohamed Haji Abdulla(now deceased); in trust for all the parties herein.

2. It is the Plaintiffs' case that on 2nd November 1987, Sidiq Haji Abdulla Ebrahim purported to transfer his half share to the Defendant. They asserted that the transfer was illegal, null and void as consent of the rest of the beneficiaries for whom Sairabanu was a trustee was not obtained. That the transfer was in contravention of Section 103 of the Registered Land Act (repealed) and the corresponding section 91 of the Land Registration Act. Further, that there is permanent house on the property in which all the parties were born and raised hence the purported transfer amounted to a disposition of family property that was prejudicial to the unregistered interests of the Plaintiffs who have been in constant uninterrupted possession of the same.

3. The Plaintiffs state that Sidiq Haji Abdulla Ebrahim died intestate on October 1993 and was not survived by a spouse or children. Consequently all named parties herein are beneficiaries of his estate in accordance with Islamic Sharia Law. It is pleaded that upon the death of Sairabanu Mohamed Haji Abdulla on 15th May 1998, her life interest devolved upon the parties herein in as per the shares set out in the Confirmation of Grant dated 11th November 1985. However, upon her death, the Defendant unilaterally, fraudulently and illegally effected a transfer of the half share held by Sairabanu to himself becoming the sole registered proprietor of the family property; particularized as follows:

- i. The Defendant transferred the half share of the late Sairabanu Mohamed Haji Abdulla in the suit property to himself without any notice, knowledge, consent or approval of the Plaintiffs
- ii. The Defendant transferred the said half share to himself without a transferor deed executed by the transferor; or if there was one execution was obtained through coercion and duress.
- iii. The half share being property held in trust under life interest of an Administrator could not be transferred without the Plaintiffs' consent hence it was illegal in contravention the provisions of the Law of Succession Act.
- iv. The purported transfer was in contravention of Sections 29 and 30 of the Registered Land Act (repealed) as well as sections 27 and 28 of the Land Registration Act as it was subject to the unregistered interests of the parties and their offspring.

4. The Plaintiffs state that by virtue of being the registered owner of the property the Defendant has been threatening the occupants of the family home with eviction and even demanding rent from them. They therefore have approached the Court seeking the following reliefs:

- i. A declaration that the Defendant irregularly and unlawfully effected the transfer of the property comprised in Title No. Mombasa/Block XVII/1039 into his own name**

ii. An order directing the Defendant to surrender the original title document for Title No. Mombasa/Block XVII/1039 to the Land Registrar of Mombasa District

iii. An order directing the Land Registrar of Mombasa District to revoke the registration of Title NO. Mombasa/Block XVII/1039 in the name of the Defendant and to rectify, cancel and/or amend the entries in the register to reflect the administrators of the estate of Sairabanu Mohamed Haji Abdulla and the administrators of the estate of Sidiq Haji Abdulla Ebrahim as the registered owner thereof as tenants in common in equal shares in place of the Defendant

IN THE ALTERNATIVE

iv. A declaration that the Defendant holds the registered interest in the property comprised in Title No. Mombasa/Block XVII/1039 in trust for his entire family including the Plaintiffs, the eleven siblings named herein and their offspring

v. The Defendant be directed by an order of this Honourable Court to surrender the title deed for Title No. Mombasa/Block XVII/1039 to the Land Registrar of Mombasa District

vi. An order directing the Land Registrar of Mombasa District to rectify the encumbrances section of the Register for Title No. Mombasa/Block XVII/1039 and/or to issue a fresh title deed to the effect that the Defendant is holding the title in trust for himself and all the Plaintiffs and/or beneficiaries if the estate of the late Sidiq Haji Abdulla Ebrahim

vii. A permanent injunction restraining the Defendant whether by himself or through his agents, employees, servants howsoever from claiming sole ownership of Title No. Mombasa/Block XVII/1039 and/or interfering with the Plaintiffs' quiet possession and/or having any dealings with the same without the consent of the Plaintiffs.

viii. Costs of this suit and interest.

5. The Defendant filed his defence and counterclaim on 26th November 2013. He admitted that their mother Sairabanu Mohamed Abdulla held the property in trust save that she transferred the property to the Defendant who had paid a debt saving it from auction. That the Plaintiffs, some of whom are older than him had no interest in the property as they had their own. Moreover, their mother transferred the property when she was of sound mind with free will in full knowledge of the Plaintiffs who did not object at the time. That their objection was merely meant to defeat his rights evidenced by the delay with which they have instituted this suit. He stated that their uncle Sidiq Haji Abdulla did not need any consent to transfer his share to the Defendant hence the said claim was baseless.

6. In his counterclaim the Defendant averred that the Plaintiffs have not come to court with clean hands. That all along they knew that the Defendant was the registered proprietor of the suit property but they resorted to harassing him prompting the police to intervene on several occasions. Further, he pleaded that the suit was time barred. He prayed for eviction orders against the Plaintiffs.

7. The hearing proceeded on 4th June 2015. The 1st Plaintiff gave evidence as the sole witness on the Plaintiffs' side. **PW1** stated that she was 72 years old, living in a rented house near the stadium. That the suit property is situated on Jomo Kenyatta Avenue. She narrated that she was born on the property and the 2nd-13th plaintiffs and the Defendant are both her brothers. That they are 13 siblings alive and one had since died. She continued that her grandfather, Haji Ibrahim was the original owner of the property. Later, ownership of the same was passed to her father Mohamed Haji Abdalla and her uncle, Sidiq Haji who are deceased. Her father died in 1984 and her uncle died later. Upon their demise, the suit property was transferred to PW1's mother as a trustee for all the children. That her mother died in 1998 aged 79.

8. PW1 continued that sometime in 2011, her brothers, Ashraf Mohamed and the 2nd Plaintiff conducted a search to ascertain the status of the suit property as the Defendant began subdividing it. The search revealed that the property was in the Defendant's name. Their inquiries as to what had transpired did not elicit any response from the Defendant. **PW1** gave evidence that she left the property two years ago. The Defendant and four of her brothers still resided thereon.

9. PW1 adopted her statement dated 18th September 2013 as part of her evidence and produced a list of 24 documents of even date as exhibits in support of their case. She pointed out that the Certificate of Grant issued to their mother at page 3 of the bundle with their entitlements stipulated as 1/14th share of the net estate. Page 9 showed a land certificate issued on 2nd September 1985 in respect of Mombasa/Block XVII which was issued after PW1's father had passed on. Her mother's death certificate was at page 13 stating that she died aged 73 on 15th May 1998. The Certificate of Official search at page 32 issued on 8th July 2011 showed that on 25th May 2000 the title was issued to the Defendant. A copy of the title deed at page 14 presents a similar scenario whereby the Defendant is named as the registered proprietor yet at page 15 it is not stated that he hold the title as a trustee.

10. PW1 averred that she did not know how the Defendant acquired the title. She narrated that before the property was transferred to Aslam, the rates were jointly paid by Aslam, Ashraf and herself. That the payment of rates did not change after the letter dated 12th January 2006 at page 19 which she authored. At page 47 is a limited grant of letters of administration which she took out so as to file the current suit. **PW1** prayed for court orders to the effect that the property be held in trust for the benefit of all family members and granting of prayers enumerated in the Plaint.

11. On cross-examination **PW1** testified that she is divorced with two children who are both boys. That she is the firstborn and that the siblings are listed in the Plaint in their exact birth order. She continued that Ahmed died but left behind children. Ishmael and Abdul live in Nairobi; but Sidiq, Abdul, Ahmed's widow, Aslam, Ashraf and Abdulla all live in the house situate on the suit property. **PW1** reiterated that her father and uncle held equal shares. That Sidiq had no children but Aslam went ahead and took his share. The letter dated 20th August 1996 was because of this development. It however was written before her mother's demise and did not expressly say that the Defendant was the registered owner of the suit land.

12. When shown the letter dated 17th August 2011 in the Defendant's list of Documents **PW1** stated that she was not aware of any loan. That she had never seen the title issued on 5th November 1987 nor was she aware that her brother co-owned the property with her mother. **PW1** gave evidence that Aslam refused to sign consent for them to administer their mother's estate yet everybody was working together. She disputed the manner in which he took ownership of the property. She also denied that the Defendant paid any loan entitling him to the property as there is no evidence of such repayment. Further, she had never seen auctioneers thereon.

13. **PW1** narrated that her mother was mentally ill when living with the Defendant at the main house. Her uncle lived with her and she only decided to move out when her sons got married. She asserted that she had not lost her right to the property and had never been served with eviction orders. **PW1** gave a description of the property which is comprised in; 4 rooms on the ground floor, two at the back and one on the upper floor. There's also a garage belonging to the Defendant where all the brothers worked.

14. The Defence case proceeded on 25th June 2019 with the Defendant testifying as **DW1**. He adopted his statement dated 4th June 2015 as his evidence and narrated that the suit land was initially registered in the names of his late father and uncle. That currently, he was the registered owner as he bought Sidiq's share. **DW1** averred that his sister, the 1st Plaintiff prepared the documentation effecting the transaction as she worked in a law firm. That the purchase price was about Kshs. 150,000. After he paid the same, Sidiq signed the transfer. **DW1** however did not have proof of payment but asserted that it was signed in the offices of Inamdar and Mboya Advocates in the presence of Abbas. He admitted that the transfer document did not bear the date of presentation.

15. **DW1** continued that when the transfer was signed, their mother was above the age of 60. That she could sign in writing or put a thumb print but she did not go to Mr. Marende's office. **DW1** appeared by himself at the said offices and signed the transfer documents. He gave evidence that all the named siblings lived on the suit land since birth but some have since moved out. That at the time of the transfer, he did not know that the Plaintiffs had any objections to Sidiq's share being transferred to his name.

16. **DW1** asserted that his siblings did not have money to pay off the loan of over Kshs.100,000 taken out by his father prompting him to pay it all by himself. He continued that Sidiq adopted one of his brothers, Mohammed Ali Abdalla. That Sidiq had no spouse or children and did not leave a will. Further, that their father died intestate in 1982-1983 and his share was registered in his mother's name. He did not know if his mother obtained a grant of letters of administration.

17. **DW1** narrated further that during his lifetime, his father approached him and told him that unless the loan was repaid, the suit land would be sold. One Mr. Garam Singh had expressed interest in buying the property when his father defaulted. That the sale of the suit land was not by public auction. He continued that the Saturday before his father died, he took **DW1** to Kharumbhai & Company Advocates offices to pay a balance of Kshs. 2500. He then died that Saturday evening.

18. **DW1** however admitted that he did not have any documentation as proof of the loan nor did he have any agreement before court reached between himself and his father. **DW1** confirmed that the transfer from his mother to himself was by consideration of love and affection pursuant to information given to her by his father. Further, she appreciated **DW1** because he used to take care of the whole family. That the transfer documents were signed by his mother in the house.

19. **DW1** continued that he did not know if Sidiq was paid since he gave all the documents to Messrs.' Marende Advocates. He admitted that he did not know Manasseh Ananda Advocate. That the handwritten document was by Ismail who wrote the same after the death of his mother and father. Moreover, at the time of her death, the people residing on the property were the ones paying rates. On re-examination, **DW1** clarified that before his father's death, he used to pay the suit property's land rates which he paid for a few years before he left. As for Sidiq's share, he averred that he paid all the requisite monies before Sidiq left for America. That it was necessary for him to get the consent of the family before the purchase because Sidiq wanted to sell his share to any willing buyer.

20. After the hearing parties elected to file their final submissions. However, the only submissions filed and on record are the Plaintiffs. I have read and reviewed the parties' pleadings, evidence, submissions and the applicable law. The issues arising are as follows:

- i. Whether Mohamed's and Sidiq's respective undivided shares in the suit property were legally transferred to the Defendant.
- ii. Whether the Defendant as the registered proprietor of the suit land holds the property exclusively in his own right or in trust for the other beneficiaries.
- iii. Whether the Plaintiffs are entitled to the orders sought.

21. Counsel for the Plaintiffs cited section 103(1) of the Registered Land Act which provides that upon the death of a proprietor of a tenancy in common, the deceased's share of the suit property is administered as part of his estate. He also cited section 35 of the Law of Succession Act to the effect that Sairabanu held a life interest in the suit land which upon her death devolved upon her children absolutely. In light of the foregoing, the Plaintiffs deemed the transfer of Mohamed's interest to the Defendant illegal.

22. The Defendant based his entitlement to exclusive ownership of the property to the fact that he settled a loan saving the property from auction. It is trite law that he who alleges must prove. Not only did the Defendant fail to avail any documentation to support this assertion, he also admitted that Sairabanu did not attend the advocate's chambers and that he did so alone for the purpose of executing the transfer documents. The same scenario plays out in the transfer between Sidiq and the Defendant. There was no sale agreement produced in court and the Defendant himself was at pains to explain whether the consideration paid was received by the vendor (Sidiq).

23. In the case of *Elijah Ouko Matagaro & another v Roselyne Dola Ouko & 4 others [2017] eKLR* the court cited the decision in *Richard Nyamemba Auka & 2 Others Vs Josephine Motarohi & 2 Others* where Okong'o J held;

“The existence or not of a customary trust is a matter of fact. The alleged trust must be pleaded particularized and proved.Customary trust is classified as an overriding interest which means that it may affect registered land although it does not appear in the register.....”

24. It is evident from the Plaintiffs’ chronology of events as to how the property changed ownership that it was transferred from their grandfather to their father and uncle. Subsequently to their mother as the administrator of the estate of their deceased father holding it in trust for the children and grandchildren. The dispute is the transfer from the administrator (Saraibanu) to the defendant. Proviso to section 28 and section 29 of the Registered Land Act Cap 300 (repealed) provides thus;

“28. Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

29. Every proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it, and subject also to the provisions of the Bankruptcy Act and to the winding-up provisions of the Companies Act, but save as aforesaid the transfer when registered shall in all respects have the same effect as a transfer for valuable consideration”

25. It is submitted for the plaintiffs that under the provisions of section 35 (5) of the Law of Succession Act Cap 160 the suit property on the death in case of a widow or re-marriage, the property devolves upon the surviving child or be equally divided among the surviving children. The plaintiffs provided evidence that the widow (mother to the parties herein) was appointed administrator of the estate Mohamed Haji Abdulla on 20th Feb 1985. Thereafter she became co-owner of the suit property with SIDIK HAJI as per copy of the title issued on 2nd Sept 1985.

26. The widow cum administrator died on 15th May 1998 intestate. It is assumed that the provisions of section 35(5) was called into play thus shifting the burden on the defendant to prove the basis of dis-inheriting his siblings. The defendant acquired his title on 25th of May 2000 as the sole registered owner thereof. The defendant claimed that he acquired his registration during the lifetime of the administrator and on account of being entitled to the same having saved the property from being auctioned.

27. The defendant filed documents in support of his case which documents were a copy of the title deed and correspondences exchanged between the advocates on record. He did not include a copy of the transfer to show that the same was executed before the demise of Saraibun. Equally, the defense evidence was that it was his father who gave him his share of the property for having saved it from being sold. However, their father did not execute the transfers to him.

28. In the application for confirmation grant by Sairabanu, paragraph 2 of the supporting affidavit deposed that the children (names stated) *were entitled to one fourteenth share in the whole residue of the net estate upon the death or re-marriage of the said SAIRABANU MOHAMED*. The defendant did not provide evidence that he objected to this mode of distribution proposed by the administrator. Further, in Sairabanu’s affidavit sworn on 22nd October 1985 at paragraph 4 deposed *that no application for provision of dependants was pending*. The inference drawn is that the registration of the widow as owner of the suit property was subject to the interests of the beneficiaries listed which beneficiaries were the plaintiffs and the defendants herein.

29. The plaintiffs further made reference to the provisions of section 90 of Cap 160. This section was brought to the attention of the executors/administrator as it is in page 2 of the letter of grant issued to Saraibanu on 25.2.1985. Section 90 (3) and (4) states thus;

“(3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted –

a. Mortgage, charge, or transfer by sale, gift, exchange, or otherwise any immoveable property for the time being vested in him under section 4, or

b. Lease any such property for a term exceeding five years.

(4) A disposal of property by an executor or administrator in contravention of subsection (2) or subsection (3), as the case may be, is voidable at the instance of any other person interested in the property.”

30. The defendant contended that the plaintiffs conceded to the transfer to him but no evidence of such consent was proved. The plaintiffs proceeded to show evidence of sharing payment of rates accruing on the suit property as shown in the letter dated 12.1.2006, 16.3.2007, 24.10.2007 together with the cheques exhibited. If there was consent to the transfer, then the defendant needed to explain to this court what interest his siblings had in the property to continue assisting him pay rates for the property solely owned by himself. Based on the evidence on record, this Court does conclude that a customary trust exists in respect of the suit land hence the Defendant’s claim for exclusive rights are not founded in law.

31. In regard to the half share of the property owned by Sidik (the parties’ uncle), the defendant stated that he purchased the same and it was within the plaintiffs’ knowledge. The plaintiffs’ have contested the allegation made by the defendant by virtue of filing of this suit. Therefore, the burden of proof was shifted on the defendant to show how he acquired the half share. In cross-exam, the witness stated that he gave his sister Kshs.150,000 to pay to Sidik but he had no evidence of the payment. He confirmed Sidik did not have a will and he died intestate.

32. The defendant stated further that it is the 1st plaintiff who processed the documents in respect of Sidik’s share to him since she was

working in a law firm. The details of the transfer remain unclear as the defendant did not endeavor to obtain copies from the lands office. Neither did he counter-claim specifically against the 1st plaintiff whom he had entrusted to effect the transfers.

33. In the absence of evidence of purchase, the provisions of section 103(1) of the Registered Land Act (repealed) but which is similar to section 91 of the Land Registration Act comes into play. Section 103(1) provides thus, **“Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.”**

34. The defendant filed a counter claim to be grant an order of eviction against his siblings and/or permission to charge them rent for living on the suit land. He has however to failed to defend his title that the registration was acquired subject to the overriding interest. Instead the plaintiffs have demonstrated that the suit property is family property which they each are entitled to one fourteenth share. This court finds that the transfer to the defendant by Sairabanu was subject to the interests of the plaintiffs thus the defendant is holding the title in trust for his benefit and for the benefit of the 1st -13th plaintiffs.

35. In conclusion, it is my finding that the Plaintiffs have proved their case on a balance of probabilities. Accordingly, I enter judgment for the Plaintiffs in terms of prayers (a), (b), (c) and (g) of the plaint. The Defendant’s counterclaim is dismissed. Since this is a sensitive dispute between family members, parties shall bear their own costs of the suit and the counter-claim.

Judgement dated & signed at Busia this 16th Day of September 2020

A. OMOLLO

JUDGE

And delivered electronically via email to the parties’ advocates this 21stDay of September 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE