



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.91 OF 2011

ABDULRAZAK ABDULREHMAN ADAM.....PLAINTIFF

VERSUS

ASLAM ABDULREHMAN ADAM.....1ST DEFENDANT

SHAMIM ABDULREHMAN ADAM.....2ND DEFENDANT

KHATIJABAL ABDULREHMAN ADAM.....3RD DEFENDANT

SERABANU ABDULREHMAN ADAM.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the defendants by way of a plaint dated 8th April, 2011 and filed on 11th April 2011. The plaint was later amended on 29th April 2011 and re-amended on 10th August 2012. The plaintiff is seeking the following reliefs:

a. The said transfer in favour of the first defendant, and subsequently in favour of the second, third and fourth defendants be set aside as being void *ab initio* or voidable.

b. An interim injunction be granted preventing the defendants from transferring or otherwise disposing off the property to any third party or with doing away with the same or continuing with the demolition of the improvements built thereon or re-structuring the same.

c. Damages

d. Costs of and incidental to these proceedings

e. Any other order which would appear not (sic) in the circumstances.

2. The plaintiff's case is that both the plaintiff and the second, third and fourth defendants together with one Esmail Abdulrehman Adam and two others are children of Sakinabai Haji Abdalla Ibrahim (deceased). That the deceased during her life time and at all material times was the sole and absolute beneficial owner of an immovable property known as **MOMBASA/BLOCK XXXIII/19** together with all buildings and improvements standing thereon.

3. The plaintiff avers that in or about March, 2008, the 1st Defendant who resides and carrying on business in the United Kingdom, visited Kenya from the United Kingdom and during the course of that visit coerced the deceased to transfer the property to the 1st defendant only to the exclusion of all other children and beneficiaries of the deceased. The plaintiff further avers that the plaintiff and the defendants and their parents and all their brothers and sisters were devout Muslims religiously practicing the Muslim faith. The plaintiff avers that their father Esmail Adam passed away in Mombasa in 2010.

4. The plaintiff states that sometime in early 2008 the deceased had fallen severely ill and was taken to M.P. Shah Hospital, Nairobi and on admission was in very poor condition suffering from Metastatic Transitional Cell Carcinoma of the Bladder and Asitis with Renal Failure. That an operation confirmed that her condition was terminal and incurable and the family members decided to bring her back to her home in Mombasa on 3rd March 2008. That after a few days, the deceased moved to the house standing on **MOMBASA/BLOCK XXXIII/19** and passed away on 27th April 2008.

5. The plaintiff states that the transfer was not signed by the deceased as she was not in a fit state to understand and sign the transfer. The plaintiff further states that even if the deceased signed the transfer the signature was obtained fraudulently or by undue influence by the defendants, adding that at the date of signing the transfer, the deceased was not in any fit condition to sign the same owing to her terminal illness and was not aware of what she was signing. The plaintiff states that as a result of the aforesaid action on the part of the 1st defendant, the transfer is void *ab initio* or voidable at the instance of the plaintiff being the son of the deceased.
6. The plaintiff has enumerated particulars of alleged fraud and duress: that the 1st defendant had explained to the deceased that the transfer was to be in favour of the five parties to this suit; that the defendants or some or the 1st defendant alone caused the deceased to sign the transfer when the deceased was very ill and did not know what she was doing; that the 2nd defendant and/or the other defendants or all of them together threatened the deceased who was a dying person that they would beat her if she did not sign, and that the deceased was made to sign the transfer document when she could not have known or been aware of its full significance.
7. The plaintiff avers that soon after the transfer of the property to the 1st defendant, the 1st defendant caused it to be transferred to the 2nd, 3rd and 4th defendants together with the 1st defendant in equal shares. It is the plaintiff's contention that as a result of the aforesaid action on the part of the 1st defendant the plaintiff has suffered loss and damage in that he has been deprived of his share of the property which would have been devolved on all the children of the deceased upon her death. In the alternative, the Plaintiff claims to have sustained damage. The plaintiff added that at the time of filing the suit the defendants were demolishing the house and other improvements on the property thereby diminishing in its value.
8. The defendants filed a statement of defence dated 6th May 2011 in which they admit that the 1st defendant visited Kenya in 2008 to attend to their late mother who was sick. They deny that the 1st defendant pressured the deceased to transfer the suit property to the exclusion of all other children of the deceased.
9. The defendants state that the deceased had expressed her wish that the property be given to the defendants herein through a will dated 31st March, 2006. The defendants further state that upon the initial transfer of the property to the 1st defendant one Esmail Abdulrehman Adam complained and filed caution against the title at the Land Registry Mombasa. They state that all parties were summoned before the Land Registrar whereupon it was resolved that the title be registered in the names of the four defendants. It is the defendants contention that the plaint as drawn is bad in law and does not disclose a reasonable cause of action.
10. In his evidence the plaintiff reiterated the facts as pleaded in the re-amended plaint. He stated that the suit property was their family property where their parents lived and where they were all brought up. The plaintiff further stated that they were four brothers, the eldest being Osman (now deceased), Ismael Abdulrehman Adam, the Plaintiff, and Aslam Abdulrehman the 1st defendant herein. The plaintiff stated that he had only sued the 1st defendant because when their mother was sick, the suit property was transferred into his name.
11. It was the evidence of the plaintiff that their mother was staying in his house but upon returning from Nairobi where she had been taken for treatment, the 1st defendant took her from the plaintiff's house to the matrimonial home which is the suit property herein. The plaintiff stated that he came to learn that their mother had transferred the suit property to the 1st defendant alone. According to the plaintiff, as one of the children of the deceased, he saw that the transfer to the 1st defendant alone as not being right. That under Islamic law, the suit property belonged to the entire family as their mother had been given the property as a gift. He stated that while the deceased was still alive, she told him to take care of his sisters. The plaintiff stated that his intention is to maintain the property within the family and not be sold.
12. The plaintiff produced copies of the title deed, transfer dated 31st March 2008, stamp duty declaration form, demand letter dated 4th September 2008, caution and a letter from K. M. Karimbhai Advocates as p.Exhibits 1-7 respectively. The plaintiff stated that she was not aware that the deceased left a will, adding that he came to learn of the will after two years.
13. In cross-examination the plaintiff stated that the deceased told him the property belonged to all her children and that the deceased also told him to take care of his sisters who are the 2nd, 3rd and 4th defendants herein. He reiterated that his interest was to ensure that they do not sell but only remain in the property. The plaintiff, who gave his age as 53 years, confirmed that he is living in his own house with his wife and children. The plaintiff further stated that they are a family of nine siblings who are still alive, one of their brothers having passed on.
14. It was the plaintiff's evidence that he has only sued the 1st defendant in whose name the suit property is registered stating that he does not have a case against the 2nd, 3rd and 4th defendants. He confirmed that the suit property was previously in the name of the deceased who passed away on 27th April 2008, and clarified that their father passed on eight months later, not after two years as indicated in the re-amended plaint. The plaintiff stated that the deceased was of good mental health save that she was in pain. The plaintiff confirmed that in the re-amended plaint, he has pleaded that he has been deprived of his share of the property which he agreed is a succession matter. He stated that he had registered a caution in May 2008 in which he stated that their brother, the 1st defendant had tricked their old mother before she died and signed a will and transfer to them. He however stated that he signed the statutory declaration in the caution without knowing the contents. He confirmed that in the will made in 2006, the deceased appointed their elder brother Ishmail Abdulrehman Adam as executor and trustee whose name was not in the title.
15. The plaintiff stated that he saw the will with his advocate, adding that even though in the reply to defence he stated that the will was not genuine, he admitted that he had not challenged it in court since 2008. The Plaintiff admitted that the photograph in the transfer (p.exhibit 2) was for the deceased but stated that he did not know if the signature was hers. The plaintiff confirmed that the transfer was signed on 31st March 2008 before Karimbhai Advocate who the plaintiff stated he knew. The plaintiff confirmed further that P.exhibit 2 was a letter written by Atikson Cleasby & Satchu Advocates to K. M. Karimbhai Advocate. On 8th December 2010, Karimbhai Advocate responded stating that the transfer was signed by the transferor in his presence at the transferor's house in old town.

16. During re-examination the plaintiff insisted that he had not sued his sisters in this case, adding that the pleadings were prepared by his advocate who amended the plaint to include the will in which his sisters are included. He stated that the deceased was sick but her mental status was okay. The plaintiff stated that he was surprised that his mother discriminated against them. His fears is that the 1st defendant who is based abroad may sell the property leaving his sisters with nothing. He insisted that their mother ought to have given the property to all her children, adding that he did not know if the Will was prepared by their mother.

17. Shamim Abdulrehman Adam, DW1 adopted her witness statement dated and filed on 24th September, 2013 as her evidence –in-chief. She is the 2nd defendant and one of the daughters of the deceased. Their deceased mother was the sole and absolute beneficial owner of the suit property. It is her evidence that sometime in 2006, their late mother had a Will drawn up to reflect her wishes regarding her property and had wished here property to be transferred to herself and the 1st, 3rd and 4th defendants, with the 2nd, 3rd and 4th defendants having an interest as long as they lived or remained unmarried. According to DW1, in 2008, their mother of her own will and mind decided to transfer the said property to reflect the wishes she had earlier indicated in her will. She stated that although the said transfer did not reflect her name and that of the 3rd and 4th defendants, the 1st defendant willingly surrendered the title and the error was rectified and a fresh title was issued indicating all the four names as per the wishes of the deceased. She denied forcing the deceased to transfer the said property to herself or the other defendants. According to the 2nd defendant, their mother was displeased with the behavior of the plaintiff and her other children towards her and therefore did not wish to let them have any part of her property. It is the evidence of DW1 that the plaintiff and their elder brother had filed a caution but after deliberations by the land registrar, the caution was removed and the property registered in their names.

18. The witness produced the documents which included the will of the late Sakinabhai dated 31st March 2016, title deed dated 21st November 2008 for **PLOT NO.MOMBASA/BLOCK XXXIII/19** in the name of the four defendants, transfers dated 31st March 2008 from the deceased to the 1st defendant drawn by K. M. Karimbhai Advocate, and a letter dated 18th November 2008 from the Land Registrar acknowledging that the registration of the defendants names in the title deed was valid.

19. In cross-examination DW1 stated that their mother became sick around 2007 and died in April 2008. That she was taken to hospital by their brother Ismael but the bill was paid by the 1st defendant. She stated that when the deceased returned from hospital, she did not stay with the plaintiff but went and stayed with the defendants. She stated that the 1st defendant was in the United Kingdom. It was her evidence that the transfer was signed at home because the doctor had recommended the deceased to have a rest. The deceased had injured her back and developed infections and died about six months later. The witness stated that she was present when the transfer in favour of the 1st defendant was signed. The 2nd, 3rd and 4th defendants' names were included upon a complaint raised by the plaintiff. The 2nd defendant stated that the 1st defendant who is based abroad and who used to come once a year gave her a power of attorney. That whenever the 1st defendant came, he would stay with them for a month or two. The 2nd defendant stated that she was a sales girl and that the 1st defendant used to send money to help support their mother. The witness stated that she was unmarried and that their mother did not include her brothers because she was unhappy with them for not supporting her. The witness added that the property belonged to the deceased and that the house was given to her as wedding gift. She stated that her brothers had their own businesses and properties and despite having money, they did not assist the deceased. That the 1st defendant would leave some money whenever he came. The witness added that wherever the 1st defendant was away, she would use her earnings as a salesgirl and later from working at Fort Jesus to support their mother.

20. In his submissions, the plaintiff identified the issues for determination as whether the transfer from the deceased to the 1st defendant is invalid, whether the surrender of the first title and the subsequent issuance of title in the names of the defendants was invalid and whether the plaintiff is entitled to share of the suit property. The plaintiff submitted that the deceased was unduly influenced by the defendants to execute the transfer. The Plaintiff relied on the case of **Nabro Properties Limited –v- Sky Structures Limited (Z. R. Shah) (South fork) Investments Limited (1986) eKLR; Hassan Hashi Shima & Another –v- Swaleh Mohamed & 7 Others (2014)eKLR** and submitted that the acquisition of the title by the 1st defendant revealed illegality, fraud and undue influence and should be revoked as provided under the provisions of Section 26 of the Land Registration Act 2012. That if the court makes a finding that the transfer to the 1st defendant is void, then the subsequent issuance of the title to defendants jointly should stand to be voided. The plaintiff further submitted that he is entitled to the suit property by reason of consanguinity, as son of the deceased.

21. The defendants submitted that this court (the Environment and Land Court) has no jurisdiction to determine the claim for the provision by dependants. That the issues raised in the pleadings are succession matters which under the Law of Succession Act should be determined by the High Court exercising its law of succession jurisdiction.

22. The defendants submitted that the claim that the signature of the deceased was obtained fraudulently has not been proved and is baseless. Similarly, that the claim that the deceased was unfit to sign the transfer is baseless. The defendants submitted that the plaintiff has not established the claim for fraud or undue influence. They relied on the cases of **Koinange & 13 Others –v- Charles Karuga Koinange (1986)KLR, Virjay Morjaria –v- Nausingh Madhusingh Darbar & Another (2000)eKLR and Kinyanyui Kamau –v- George Kamau Njoroge (2015) eKLR**. The defendants further submitted that the plaintiff has not proved that he is entitled to the deceased's suit property as he has never made an application as required under Section 26 of Law of Succession Act.

23. The issues for determination in this matter are as follows:

- a) Was the suit property lawfully transferred to the 1st defendant
- b) Is the plaintiff entitled to the reliefs sought.

24. It is not in dispute that the suit property otherwise known as **PLOT NO.MOMBASA/BLOCK XXXIII/19** was initially owned by the late Sakinabai Haji Abdalla Ibrahim who died on 27th April 2008 after an illness.

25. The plaintiff and the defendants are some of the children of the deceased. By a transfer dated 31st March, 2008, the deceased transferred the suit property to the 1st defendant. The plaintiff faulted the said transfer alleging that the same was procured through fraud and duress. According to the plaintiff the deceased signed the transfer when she was very sick and did not know what she was signing. The property was thereafter transferred and registered in the names of all the defendants. It is the plaintiff's contention that he has been deprived of his share of the property which would have been devolved to all the children of the deceased.

26. I have perused the transfer dated 31st March 2008 which was produced as p.exhibit 2. The same was drawn by K. M. Karimbhai Advocate. The transferor and the transferee also signed the said instrument in the presence of K.M. Karimbhai Advocate. In their letter dated 25th November 2010 (P. exhibits 7), M/s Atkinson Cleasby & Satchu, the previous advocates for the plaintiff wanted to confirm that the witnessing signature on the transfer was that of K. M. Karimbhai Advocate and whether the said transfer was signed in his presence by the transferor. In reply, K.M. Karimbhai in the letter dated 8th December, 2010 confirmed that the transfer was signed by the transferor in his presence at the transferor's house in the Old Town. This was corroborated by the evidence of DW1 who confirmed that the documents were signed at their home in the presence of K. M.Karimbhai Advocate.

27. In his evidence, the Plaintiff confirmed that although their deceased mother was sick, her mental condition was good. The plaintiff's concern and surprise was the discrimination by their mother against them. It is therefore my conclusion that the transfer was done willingly. It is my finding that the allegations of fraud and duress have not been proved.

28. The deceased was the registered owner of the suit property. Accordingly, as the registered owner of the suit property, the deceased had all the rights that a registered owner to the land would have. Those rights would include the right to transfer the land. The deceased held the land subject only to leases, charges and overriding interests as recognized in Section 28 of the Land Registration Act No.3 of 2012 or Section 30 of the Registered Land Act Cap 30 (repealed) which was the applicable law. The plaintiff has submitted that the suit property was given to her late mother as a wedding gift. That may have been so. Where one was gifted and became a proprietor through a transfer, unless restrictions were placed on the title, there was no automatic trust arising from the transfer. For a trust to arise the transfer would have to be one that clearly indicated that the land was transferred to the proprietor in trust for her children. In my view, the deceased as proprietor was not bound to consult her children when she wanted to transfer the property. There was no trust relationship as concerned the land between the proprietor and her children. The deceased being the registered proprietor of the suit property had indefeasible title under Section 25 and 26 of the Land Registration Act (or Section 27 and 28 of the repealed Act) unless proved she acquired the title fraudulently. In this case, there was no allegation that the deceased acquired the title fraudulently.

29. In his evidence, the Plaintiff has maintained that his concern is the welfare of his sisters. He maintained that he had not sued his sisters. However, the pleadings are contracting the Plaintiff's evidence. Besides the 1st defendant it is clear the plaintiff has sued his sisters who are named as the 2nd, 3rd and 4th defendants. However, if the plaintiff's concern for bringing the suit was the welfare of his said sisters, the evidence that has emerged is that the 2nd, 3rd and 4th defendants are now the registered owners of the suit property alongside the 1st defendant. It is therefore my view that the plaintiff's concern, whatever its worth, has been achieved.

30. Having found that the transfer of the suit property from the deceased to the 1st defendant was valid, I also find that the subsequent transfer from the 1st defendant was valid.

31. From the material placed before me, I am not satisfied that the plaintiff has proved, his case on a balance of probabilities. The upshot of the above is that the same is hereby dismissed.

32. Considering the circumstances of this case and the relationship of the parties who are siblings, I order that each party to bear their own costs. It is so ordered.

Delivered, signed and dated at Mombasa this 1ST April, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Kariuki for plaintiff

Sitonik for defendants

Yumna Court Assistant

C.K. YANO

JUDGE