



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 302 OF 2016**

**1. ISLAM MOHAMED FARAJ**

**2. TWALIB MOHAMED FARAJ.....PLAINTIFFS**

**VERSUS**

**1. ADNA SALIM FARAJ**

**2. AHMED SALIM FARAJ**

**3. ALI SALIM FARAJ**

**4. ANWAR SALIM FARAJ**

**5. AWADH SALIM FARAJ**

**6. FARID SALIM FARAJ**

**7. FEISAL SALIM FARAJ**

**8. MOHAMED SALIM FARAJ**

**9. KULTHUM SALIM FARAJ**

**10. FATMA ASHUR FARAJ.....DEFENDANTS**

**JUDGMENT**

1. The Plaintiffs moved this court by way of plaint dated 18<sup>th</sup> October, 2016 seeking judgment against the defendants jointly and severally in the following terms:

**a. A declaration that the defendants' actions are illegal, null and void *ab initio*.**

**b. An order of eviction and vacant possession against the defendants in respect of the plaintiffs' parcel of Land known as MSA/BLOCK XV/319 situated in Mombasa.**

**c. A permanent order of injunction restraining the defendants whether by themselves, their agents, servants, employees, or any other person whatsoever from trespassing, remaining or constructing upon, fencing, cultivation, alienating or in any way dealing with the plaintiffs' parcel of land known as MSA/BLOCK XV/319 situated in Mombasa**

**d. Damages for illegal trespass.**

**e. Costs of and/or incidental to the suit.**

2. The plaintiffs' case is that at all material times, the plaintiffs are the registered and beneficial owners of the parcel of land known as **PLOT NUMBER MSA/BLOCK XV/319** situated in Mombasa County (hereinafter referred to as "the suit land"). The plaintiffs aver that

sometime in the year 2010 or thereabouts, the defendants trespassed upon the suit land and have gone ahead and continued to reside in the residential houses on the suit property, and that despite several requests and demands, the defendants have refused to vacate from the suit land and have remained thereon illegally and to the detriment of the Plaintiffs' property.

3. The defendants filed a joint statement of defence and counter-claim dated 6<sup>th</sup> December, 2016 in which they aver that the plaintiffs' claim is vague and superfluous and premised on ignorance of existing facts on the ground. The defendants deny being trespassers on the suit property and aver that the plaintiffs' procured the registration of the suit property in their names by fraud.

4. The defendants state that they are children of Salim Faraj Said and the 10<sup>th</sup> defendant is the widow of the said Salim Faraj Said. That the suit property was initially **PLOT NO.376** and when the area was resurveyed sometime in the mid 1980s, it was allotted **NO.1/XV/MAJENGO** and after further subdivision and amendment to the Registered Index Maps (RIM), it became **MSA/BLOCK XV/319**. The defendants further state that half of the said property was bought by the said Salim Said Faraj Said on 25<sup>th</sup> April 1977 for his mother Fatuma Awadh Omar Bashamakh from one Ali Omar Elshabiby who was acting on behalf of his father, one Omar Karama El-Shibiby who was the legal owner at a price of Kshs.40,000. That even though the suit property was bought by the said Salim Faraj for his mother, she immediately surrendered it to him upon the purchase and he moved in together with all his children and third wife, the 10<sup>th</sup> defendant, and renovated the house which was standing thereon, occupied part of it and rented out other rooms. That the sale was for both the house and land, upon which it stands. It is the defendants contention that the house and land after the said purchase, was owned by Omar Karama El Shabiby and Fatuma Awadh in equal undivided shares.

5. The defendants aver that when title deeds were issued in the area in the 1990s, Omar Karama El-Shabiby caused the entire land to be registered in his name. That one Mohamed Faraj Said, a brother to Salim Faraj Said, and the father to the plaintiffs, filed Mombasa HCCC No.124 of 2001- Mohamed Faraj Said –v- Omar Karama El-Shabiby, to help his brother and the defendants but lost the case. They add that Omar Karama El-Shabiby died in 2001 and his son, Ali Omar Karama El-Shabiby took out letters of administration over his estate which were issued on 8<sup>th</sup> May, 2002. That on 23<sup>rd</sup> May 2002, before the confirmation of the said grant, Ali Omar Karama El-Shabiby sold his half (1/2) share in the suit property at Kshs.4,000,000/= to one Mohamed Mahfudh and that he therefore had no further saleable interest in the suit property. On 10<sup>th</sup> June 2009, the 1<sup>st</sup> to 9<sup>th</sup> Defendants' father, Salim Faraj, placed a caution on the suit property to prevent Ali Omar Karama El-Shabiby from transferring the entire land to the said Mohamed Mahfudh, but the caution was later removed on 2<sup>nd</sup> October 2009 on allegation that it was entered in error, and both transfers registered, i.e. one by personal representative to person entitled under will or on an intestacy dated 27<sup>th</sup> February 2009, and the one to the plaintiffs.

6. The defendants accuse the plaintiffs of secretly causing the entire land to be registered in their names while they knew that half(1/2) undivided share thereof belongs to the 1<sup>st</sup> to 9<sup>th</sup> defendants' father, the late Salim Faraj, who is also husband to the 10<sup>th</sup> defendant. The defendants want the court to order revocation of the plaintiffs' title and for the register in respect of the suit property to be rectified by cancelling entries Nos.8,9,10, 11 and 12 made in the Green Card. In their counter-claim, the defendants pray for dismissal of the plaintiffs' suit with costs and for judgment to be entered for them in the following terms:

**i. A declaration that estate of the late Omar Karama El-Shabiby was only entitled to half (1/2) undivided share of the suit property, and his son Ali Omar Karama El-Shabiby having sold the said half (1/2) undivided interest in the said property to Mohamed Mahfudh had no further saleable interest in the suit.**

**ii. A declaration that the purported sale of the suit property to the plaintiffs by Ali Omar Karama El-Shabiby offends the cardinal rule of “*memo dat quid non hebet*” and therefore null and void.**

**iii. A declaration that the defendants are entitled to half (1/2) undivided share in the suit property.**

**iv. An order directing the Land Registrar, Mombasa, pursuant to Section 80 of the Land Registration Act, read with Section 13 of the Environment and Land Court Act, to revoke the plaintiffs' title in respect of PLOT NO.MSA/BLOCK XV/319 and to rectify the register thereof by cancelling entries nos. 8, 9, 10, 11 and 12 to the subject green card, and to direct that the suit property be surveyed and subdivided into two subdivisions between the defendants and Ali Omar Karama El-Shabiby, or as the case may be, Mohamed Mahfudh and be registered as such in their respective names.**

**v. Any other relief the court may deem fit to grant.**

7. Islam Mohamed Faraj, the 1<sup>st</sup> plaintiff, in his evidence adopted his witness statement dated 18<sup>th</sup> October, 2016 in which he states that the suit property initially belonged to their father Mohamed Faraj Said and his partner, Omar Karama Shibiby who died on 18<sup>th</sup> June 2001. That on 13<sup>th</sup> March, 2009, the Administrators of the Estate of Omar Karama Shibiby sold the deceased's share in the property to him at a price of Kshs.5,000,000/= whereafter, he transferred the property to his name and that of his brother, the 2<sup>nd</sup> plaintiff. That previously, their late uncle, Salim Faraj Said, had been allowed to live on the property by their father on compassionate grounds after he had been incited from his house in Magongo. That after the death of their uncle, the defendants who are his children and widow started claiming that the property belongs to them and that they have refused to move out of the property and are illegally collecting rent from tenants. It is his evidence that the defendants have no right or claim over the suit property. He produced the list of documents dated 18<sup>th</sup> October, 2016 and filed on 19<sup>th</sup> October 2016 as p.exhibits 1 to 8. The documents produced are copy of Title Deed of Title no. Mombasa/block xv/319 dated 9<sup>th</sup> March, 1994 in the name of Omar Karama, Agreement dated 31<sup>st</sup> March 198 between Mohamed Awadh Al-Shabiby and Mohamed Faraj Said showing that half share of the house without land on the suit property was transferred to Omar Karama Al-Shibiby, copy of valuation requisition for stamp duty dated 2<sup>nd</sup> March, 2009, transfer dated 29<sup>th</sup> February 2009 from Ali Karama El-Shabiby as personal representative of Omar Karama Shabiby to the plaintiffs, copy of certificate of confirmation of grant dated 4<sup>th</sup> March, 2003 issued to Ali Omar Karama El-Shabiby, copy of Transfer by personal Representative to person entitled under a will or on an Intestacy dated 27<sup>th</sup> August, 2009 and registered on 2<sup>nd</sup> October 2009, Copy of Title Deed in Plaintiffs' names and certificate of official search dated 11<sup>th</sup> February 2016 showing the plaintiffs as

proprietors of the suit property.

8. During cross-examination, the 1<sup>st</sup> plaintiff confirmed that he bought the plot when the defendants were in occupation. He admitted that his father had filed HCCC No.124 of 2001 but did not know the outcome of that case. He maintained that the defendants are trespassers on the suit property.

9. Mohamed Faraj Said Bashamakh testified as PW2. He stated that he accommodated the defendants when his late brother, Salim Faraj Said was unable to pay rent for the house he rented. That he gave them two rooms. However, he started using force to collect rent from some tenants and later claimed the house, forcing PW2 to file suit, being Mombasa HCCC No.124 of 2001. He denied that the house belonged to their mother and confirmed that the High Court case was settled when the plaintiffs purchased the plot from him and the other half from Mohamed Mahfudh.

10. Ahmed Salim Faraj, the 2<sup>nd</sup> defendant, testified as DW1 and adopted his witness statement dated and filed on 9<sup>th</sup> June, 2017. He stated that he does not live on the suit premises, having left in the year 2000. He further stated that it was only the 10<sup>th</sup> defendant who was living on the suit premises. In the said witness statement, DW1 reiterated the contents of the defence and counter-claim. He produced the defendants' list of documents dated 9<sup>th</sup> June 2017 as D.exhibits 1 to 8.

11. Both parties filed submissions which I have read and considered and I need not reproduce their contents herein. Upon perusal of the pleadings filed herein including the written submissions and the exhibits, the following are the issues for determination:

**i. Whether the plaintiffs are the registered owners of the property known as Mombasa/block xv/319**

**ii. Whether the defendants are entitled to half (1/2) share in the suit property.**

**iii. Are the plaintiffs entitled to their claim?**

**iv. Are the defendants entitled to their counter-claim?**

**v. What should be the order as to costs of the suit and the counter-claim?**

12. The common position of the parties is that the plaintiffs and the 1<sup>st</sup> to 9<sup>th</sup> defendants are cousins as their fathers are brothers. The 10<sup>th</sup> defendant is the mother to the 1<sup>st</sup> to 9<sup>th</sup> defendants.

13. There is no dispute that the plaintiffs are the registered proprietors of the suit property with a title deed (p.exhibit 7) dated 2<sup>nd</sup> October 2009 issued in their favour. It is trite law that a title deed is prima facie proof of ownership of land. Section 32(2) of the Registered Land Act Cap 300 (repealed) under which the land was registered provided as follows:

***“A title deed or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.”***

Section 37 (1) of the said Act provided that:

***“Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed until the contrary is proved.”***

14. Similarly, Section 24 of the Land Registration Act, 2012 provides as follows:

***“Subject to this Act –***

***a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ”***

Section 25 (1) of the Land Registration Act provides as follows:

***“(1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever; but subject –***

***a) To the leases, charges and other encumbrances and to the condition and restrictions, if any, shown in the register; and***

***b) To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.***

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”**

Section 26 of the same Act provides that the certificate of title is to be held as conclusive evidence of proprietorship. It states as follows:

**(1) The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –**

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

15. In the instant case, the plaintiffs have tendered documentary evidence indicating that the suit property was transferred into their names upon payment of some consideration. Whereas the defendants’ case is that the suit property was bought by the late Salim Faraj for his mother Fatuma Awadh Bashamakh, the court notes that the agreement produced by the defendants referred to a temporary house. The defendants have, in my view, failed to produce any document showing any proof of ownership or of purchase of the suit property on their part r on the part of the late Salim Faraj. From the evidence on record, the court is not satisfied that the defendants have proved their claim that the late Salim Faraj owned the suit property or that he purchased the same for his mother, the late Fatuma Awadh. Moreover, there were no letters of administration for the estate of the deceased confirming any part of the suit property to the defendants as alleged in their pleadings.

16. In this case, it was the defendants’ case that he plaintiffs registered the suit property in their names fraudulently. Fraud must be distinctly proved. The defendants have however failed to discharge their burden through evidence on the alleged fraud. There was no evidence led by the defendants to prove the allegation of fraud on the part of the plaintiffs.

17. The evidence adduced by the plaintiffs on how they acquired the suit property was very clear. Besides the half share that was owned by the plaintiffs father, the plaintiffs were able to produce an agreement showing that they purchased the other half from the estate of Mohamed Awadh Al- Shabiby. Besides the agreement, the plaintiffs produced the Grant and certificate of confirmation of a Grant as well as a Transfer by Personal Representation of the Estate of Omar Karama El-Shabiby.

18. Besides the succession proceedings referred to hereinabove, there is also evidence on record that the suit property was the subject of HCCC No.124 of 2001 which was subsequently settled and title issued in favour of the plaintiff. There was no evidence adduced showing that the defendants or those they claim from were parties to the said suit. If indeed the defendants had an interest in the suit land, at least they could have joined that suit to protect their interests. From the material presented before court and the evidence adduced, it is my finding that the plaintiffs acquired the suit property and had it registered in their names legally and through lawful means. There was no evidence that the same was acquired illegally, unprocedurally or through a corrupt scheme.

19. From the evidence on record, the defendants entered the suit property with the permission of the plaintiff’s father. There is however no doubt that the defendants became trespassers when they failed to vacate from the suit property when asked to do so by the plaintiffs when the plaintiffs became the lawful owners of the property. The plaintiffs have proved that the defendants are forcefully occupying the suit property and illegally collecting rent. The plaintiffs no doubt are entitled to general damages in tort for the loss incurred for the wrongful action on thir part. The issue which arises is the measure of such damages. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff property immediately after the trespass or the costs of restoration, whichever is less. The plaintiffs herein did not adduce any evidence as to the amount of rent collected by the defendants as well as the expected rent from the premises occupied by the defendants. It therefore becomes difficult to assess general damages for trespass. The plaintiffs have proposed a sum of Kshs.10,000,000/= as general damages for trespass. In my considered view, the figure proposed by the plaintiffs is on the higher side and no basis for it was made out. Considering the circumstances of this case, I would award a nominal sum of Kshs.1,000,000/= as general damages for trespass. This would reasonably recompense the plaintiffs for being denied and deprived of the use and income from their property for quite some time.

20. Having now carefully considered the available evidence, the court finds that the plaintiffs have proved their case on the balance of probabilities. On the other hand, the defendants have failed to prove their counter-claim to the required standard. Consequently, the court enters judgment in the following terms:

**a. The defendants be and are hereby ordered to vacate and deliver vacant possession of the plaintiffs property known as TITLE NO.MOMBASA/BLOCK XV/319 to the plaintiffs within 60 days from the date of the service of the decree herein upon them.**

**b. In default of compliance with (a) above the plaintiffs shall be entitled to an order of eviction for the forcefully removal of the defendants, their agents and/or servants from TITLE NO.MOMBASA/BLOCK XV/319 upon application.**

**c. A permanent order of injunction be and is hereby issued restraining the defendant whether by themselves, agents, or servants or otherwise howsoever from remaining on or continuing in occupation of the suit property.**

**d. The plaintiffs are awarded Kshs.1,000,000/= general damages for trespass together with interest at court rates from the date of judgment until payment in full.**

**e. The defendants counter-claim be and is hereby dismissed with costs to the plaintiffs.**

**f. The plaintiffs shall have the costs of the suit.**

**DATED, SIGNED and DELIVERED at MOMBASA this 6<sup>th</sup> day of May 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Wafula holding for Mutubia for Plaintiffs

Odongo for Defendants

Yumna Court Assistant

**C.K. YANO**

**JUDGE**