



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 27 OF 2010 (OS)

IN THE MATTER OF THE ESTATE OF THE LATE ESHA SAID ABDALLA

AND

IN THE MATTER OF PLOT NO. 309 MALINDI

BETWEEN

ABUD MOHAMED ABUD.....PLAINTIFF

VERSUS

TWAHIYA MOHAMMED BIN ABDULLAH.....DEFENDANT

JUDGMENT

1. By an Originating Summons dated and filed herein on 29th March 2010, Abud Mohamed Abud(the Applicant) urges the Court to determine the following questions:-

- 1. Whether Plot No. 309 Malindi situate at Kijiwetanga Kwachocha area in Malindi District is jointly registered in the names (of) Hamed Bin Omar (Deceased) and the heirs of Said Bin Omar (Deceased).***
- 2. Whether the Khadhi's Court's determination in Succession Cause No. 55 of 2009(Mombasa) established the late Esha Said Abdalla as being heir of the late Said Bin Omar.***
- 3. Whether the said Esha Said Abdalla was/is entitled to one-third(20.11 acres) if the 60.35 acre suit property Plot No. 309 Malindi as determined in the Kadhis Courts determination in the Succession Cause aforesaid.***
- 4. Whether the heirs of the late Esha Said Abdalla are entitled to a third (20.11 acres) of the 60.35 acres suit property Plot No. 309 Malindi as established in the Kadhi Court's determination in the Succession Cause aforesaid.***
- 5. Whether the present heirs of the late Esha Said Abdalla have been ascertained through the Kadhi's Court's determination aforesaid.***
- 6. Whether the heirs of the late Esha Said Abdalla presently occupy 4.5 acres portion only of the late Esha Said Abdalla's 20.11 acre share of the said Portion No. 309.***
- 7. Whether the Defendant is an heir to the Estate of the late Esha Said Abdalla.***
- 8. Whether the Defendant unlawfully occupies 7.5 acres Portion or thereabouts the property of the Estate of the late Esha Said Abdalla; and***
- 9. Whether the heirs of the Estate of the late Esha Said Abdalla are entitled to possession of the Portion of 7.5 acres unlawfully occupied by the Defendant.***

2. The Originating Summons is supported by an Affidavit sworn by the Applicant wherein he accuses the Respondent of unlawfully occupying a portion measuring 7.5 acres of the suit property despite the fact that she has no colour of right thereto.

3. In a Replying Affidavit sworn on 8th July 2010 and filed herein on 9th July 2010, Twahiya Mohammed Abdalla (the Respondent) denies the Applicant's accusations. She avers that her father the late Mohammed Bin Abdulla had by a Sale Agreement dated 2nd September 1943 bought the parcel of land measuring 7.5 acres from the then owners thereof and she and her siblings were born and brought up on the said parcel of land.
4. The Respondent further avers that she and her siblings have no interest in the Applicants Plot No. 309 as they continue to only occupy their portion of land as they have done since 1943.
5. Prior to the trial herein parties took directions that the matter would proceed by way of affidavit evidence. I have accordingly perused and considered the pleadings and the Affidavits filed by the parties herein. I have also considered the submissions filed by the Learned Advocates for the Applicant. The Respondents did not file any submissions.
6. It is the Applicant's case that Plot No. 309 Malindi is registered in the names of one Hamed Bin Said Bin Omar together with the heirs of Said Bin Omar. It is further the Applicant's case that the heirs of Estate of the said Said Bin Omar were established in the Mombasa Kadhi's Court Succession Cause No. 55 of 2009. The Applicant is one of the heirs of the said Estate.
7. The Applicant accuses the Respondent of unlawfully occupying 7.5 acres of land that belongs to the heirs of the Estate of Said Bin Omar. He does not however state when the Respondent entered the land and/or commenced her occupation thereof.
8. According to the Respondent the Portion of land claimed by the Applicant was bought by her father the late Mohammed Bin Abdalla way back in 1943 and she and her siblings were born on and have always used and occupied the 7.5 acres as their homes.
9. It was noteworthy that the Applicant does not deny the fact that the Respondent and her family have been on the land for that long period. It is however the Applicant's case that the Kadhi's Court in the aforesaid Succession Cause had determined the portions of land that they should occupy and that part of their inheritance is occupied by the Respondent.
10. While I was not able to determine from the material placed before me when Said Bin Omar passed away, it was clear to me that the Respondents have been on the disputed parcel of land courtesy of the Sale Agreement dated 2nd September 1943. A translation of the Agreement originally in Arabic clearly shows that the Respondent's father the late Mohammed Bin Abdalla bought the piece of land for Kshs 300/-. The measurements and the boundaries of the land are clearly given in the Agreement.
11. As it were, a perusal of the Certificate of Ownership being relied upon by the Applicant reveals that it was issued on 19th January 1917. It is that Certificate of Ownership that gives the measurement of the land as 60.35 acres.
12. If indeed the owners of the land did not sell a Portion thereof to the Respondent's family, it is difficult to see how they tolerated their stay on the land from 1943 to-date. In my mind I think the only reason the Applicant's predecessors in title did not bother with the presence of the Respondents family on their land is the fact that they were aware of the sale agreement.
13. Accordingly I was not persuaded that there was merit in the Originating Summons. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE