



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 234 OF 2004

NAJMA SURUR RIZIK SURUR.....PLAINTIFF

VERSUS

- 1. MANSUR SAID**
- 2. ABDU SAID**
- 3. SALIM SAID**
- 4. SAHALE SAID**
- 5. ATIYE SAID**
- 6. SWALEHE SAID**
- 7. AFYE SAID**
- 8. ABULEHMAN KIMANI KABILIA**
- 9. DISTRICT LAND REGISTRAR, MOMBASA.....DEFENDANTS**

JUDGMENT

1. By a Plaint dated and filed on 13th October 2004, the Plaintiff seeks two orders, firstly, that a declaratory order be issued declaring null and void and of no legal effect transfer of the property known as MOMBASA/BLOCK XV/458 by the 1st to 7th Defendants to the 8th Defendant, and secondly, that the 9th Defendant, be ordered to cancel the registration of the 8th Defendant as the owner thereof.
2. The Plaintiff is the widow of the late Abdalla Said Salim who at the time of his death was a Muslim and the registered owner of the property known as MOMBASA/BLOCK XV/458 (the suit property). Apart from the Plaintiff, the deceased was survived by brothers and sisters, who are the 1st to 7th defendants.
3. The Plaintiff avers that she been a resident in the suit property. That sometime in September 2004, the 1st to 8th Defendants, without the Plaintiff's consent purported to transfer the suit property to the 8th defendant for a consideration of Kshs.1,600,000/= in pursuance whereof the 9th Defendant proceeded to alter the register and issue title to the 8th Defendant. It is the Plaintiff's case that the said transfer was unlawful, invalid and ineffectual in so far as the same was concluded without the consent and/or authority of all parties interested. That since the demise of the deceased, no grant of representation has been taken out in respect of his estate and consequently the 1st to 7th Defendants had no title to pass to the 8th Defendant.
4. In their statement of defence dated 19th October 2004 and filed on 21st October 2004 the 1st to 8th Defendants state that the sale of the house in PLOT MOMBASA/BLOCK XV/458 and transfer of the same to the 8th Defendant was necessitated by the Plaintiff's refusal to either buy the house or vacate the same to enable the defendants implement the ruling of Kadhi's court wherein the estate of the deceased was shared accordingly. The 1st to 7th Defendants aver that by virtue of Section 48 (2) of the Law of Succession act, Cap 160 Laws of Kenya, the Kadhi's Court is empowered to hear and determine any questions relating to inheritance in accordance with Muslim law and therefore the Kadhi's ruling of 4th August 2004 in Kadhi's court at Mombasa Succession Cause No. 40 of 2000 was sufficient proof of a grant.

5. At the trial, the Plaintiff adopted her witness statement dated 18th November, 2018 and filed on 20th November, 2018. She told the court that she is the widow of the late Abdalla Said Salim who passed away in 1998 leaving behind several children from his other marriage. The Plaintiff does not have children of her own. That at the time of his death, the Plaintiff and the deceased was living in a house in the suit property. That following the demise of the deceased, and without the Plaintiff's knowledge, the deceased's children went before the Kadhi's Court and instituted succession proceedings without involving the Plaintiff. The Plaintiff stated that she later received notification that her matrimonial home had been sold to the 8th Defendant herein following the proceedings from the Kadhi's Court, hence the filing of this suit. The Plaintiff stated that following the sale, she was offered a portion of the sale price which she declined as she was not privy to the process notwithstanding that she was entitled in priority to administration of the deceased's estate. The Plaintiff produced a copy of the Title Deed for TITLE NO. MOMBASA/BLOCK XV/458, dated 28th September, 2004; application, judgment and order in Mombasa Kadhi's Court Succession No. 40 of 2000; Letter dated 9th October 2004; Agreement dated 21st September 2004; Transfer dated 15th September, 2004; letter dated 15th September 2004 and copy of title Deed for TITLE NO. MOMBASA/BLOCK XV/458 dated 23rd March 1995.

6. The Defendants did not attend court during the hearing even though they were aware of the hearing date. The advocate for the Defendants also opted not to participate at the trial; hence the Defendants' case was closed without any witness testifying.

7. In his submissions filed on 14th May, 2019, the Plaintiff's counsel, Mr. Mwakisha reiterated the Plaintiff's case as stated in the plaint and gave a summary of preliminary steps taken by the Plaintiff including moving the court for an order to stop the further alienation of the suit property and her ejection therefrom, a plea that was granted on 29th April 2005, prompting Civil Appeal No.186 of 2005 which appeal was dismissed on 8th October 2010. Counsel submitted inter alia, that the 1st and 7th defendants appear to have been acting under the misrepresentation that the Kadhi's court as to who were the beneficiaries and what assets for the deceased was sufficient as an instrument of transfer. That perhaps may have been so had the court ordered a sale in specific terms, which was not the case here. He submitted that the aggrieved beneficiary, the plaintiff, who stands to be evicted is entitled to safeguard her personal interest and right to occupation of the property as a widow, adding that the question of locus has not been put forward as part of the defences before court. He submitted that the sale in the absence of adherence to the requirements of Section 119 of the Registered Land Act, Cap 300 (now repealed) as to transmission of landed property upon death was in this instance irregular and/or unlawful.

8. I have considered the evidence placed before me by the Plaintiff. I have equally considered the submissions made. The suit property is registered under the Registered Land Act (now repealed). Section 119 thereof provided thus:

“if a sole proprietor dies, his personal representative, on an application to the Registrar in the prescribed form and on production to him of grant, will be entitled to be registered by transmission as proprietor in place of the deceased....”

9. It is common ground that the plaintiff is the widow of the late Abdalla Said Salim (deceased), hitherto the registered proprietor of the suit property. Following the death of the deceased, the 1st to 7th defendants herein, also beneficiaries of the deceased's estate, sold the propriety to the 8th defendant. This was done presumably on the basis of a judgment in Mombasa Kadhi's court Succession Cause No.40 of 2000. From the evidence on record, it is apparent that by a judgment dated 4th August 2004, the Chief Kadhi, Hammad M. Kassim identified the deceased's estate as comprising the suit property, among others. The Chief Kadhi also identified the beneficiaries of the deceased's estate and their respective shares. The Plaintiff and the 1st to 7th Defendants were among the beneficiaries. In the said judgment, the Plaintiff's share is 2/16. The shares of the 1st to 7th Defendants are also set out in the said judgment.

10. It is not disputed that no grant has been obtained under the Law of Succession Act to any person to act as administrator of the estate of the deceased. The court has perused the provisions of the Law of Succession Act, Cap 160 Laws of Kenya. Section 2 (1) thereof states that “except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.” Express exclusion of the provisions of the Act is contained under sub-section (3) and subsection (4) of that Section, being amendment to the Act under provisions of Act 21 of 1990. The exclusion of the application of the Act is in relation to succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law. However, notwithstanding the above the Law of Succession Act headed PART VII dealing with the administration of estates shall be applicable where it is not inconsistent with Muslim law.

11. In my view, and as rightly submitted by counsel for the Plaintiff, part VII of the Law of Succession Act cannot of itself be said to be in conflict with Muslim law where the question turns around the making of a grant only, being as it is providing only a mechanism by which a grant of representation is obtained, a process that in many cases would be facilitative in transmission of property to heirs. Such a step would indeed be desirable so as to meet the requirements of Section 119 of the Registered Land Act (now repealed) regarding transmission upon the death of a proprietor, which Act drew no distinction between Muslim and other estates.

12. The Plaintiff's evidence is unchallenged that she is the widow of the deceased and has been occupying the suit property as their matrimonial home. Indeed the Kadhi's court in its judgment identified the Plaintiff as a beneficiary who is entitled to 2/16 of the estate. The 1st to the 7th Defendants could not purport to sell and transfer the entire estate, including the plaintiff's share, without the consent and /or authority of the Plaintiff, and moreso in the absence of a grant or order from the court. As already stated, Succession Cause No. 40 of 2000 in the Kadhi's court only identified the beneficiaries and their shares. I also note that in its order issued on 21st September 2004, the Kadhi's court restrained the sell or transfer of the suit property without the consent or authority of the court.

13. In the circumstances, I am satisfied that the Plaintiff has proved her case to the required standard. Accordingly, I make the following orders:

a. A declaration that the transfer by the 1st to 7th defendants of the property known as MOMBASA/BLOCK XV/458 is null and void and of no effect in law

b. The 9th defendant is directed to forthwith cancel the title deed issued to the 8th Defendant in respect of MOMBASA/BLOCK XV/458 and rectify the register as necessary.

c. The defendants shall pay costs of this suit jointly and severally.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 18th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Kenzi holding brief for Mwakisha for plaintiff

No appearance for Okanga for defendant

Yumna Court Assistant

C.K. YANO

JUDGE