



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

ATMOMBASA

ELC CASE NO. 198 OF 2013

SOUD ABDULLA LASSIE (suing on behalf of
the estate of the late **LASSIE BIN ABDULLA**).....**PLAINTIFF/RESPONDENT**

=VERSUS=

- 1. FATMA KHAMIS JENEBY**
- 2. THE LAND REGISTRAR, MOMBASA.....DEFENDANTS/APPLICANT**

A N D

RUKIYA ABDALLA LASSIE &
LASSIE ABDALLA LASSIE.....INTERESTED PARTIES

RULING

1. The application for determination is dated 3rd March 2017 brought by the intended necessary Parties seeking the following orders:

- i. Spent
- ii. Spent
- iii. That the honourable court be pleased to join the applicants herein as necessary parties or as the case may be defendants to the suit.**
- iv. That the court be pleased to set aside the consent order made and issued on the 28. 10.2015 and the applicants be given unconditional leave to defend this suit.**
- v. The costs of the application be provided for.**

2. The application is supported by the two affidavits sworn on 3rd March 2017 by the two applicants, their mother (1ST defendant) and the grounds stated on the face of it. The applicants aver that the suit plot no. **MSA/BLOCK XV1/509** was bought solely by their late father Abdalla Mbarak Lassie who also commenced developing it before his demise in the year 2007. That it was misleading for the plaintiff to state that the suit plot was owned by his father Lassie Bin Abdulla – deceased who died in 1986. That the

consent of 28. 10. 2015 was entered into without their knowledge yet their mother (the defendant) was only registered as trustee on their (applicants) behalf of the suit property. Further that they have attained the age of majority hence entitled to own the land in their own names. The defendant has also denied giving her previous advocate on record Mr. Olaba instructions to enter into such a consent. That she only became aware of the said consent when she received a letter from the Land Registrar requiring her to surrender the original title deed for rectification.

3. The application is opposed by the plaintiff vide his replying affidavit sworn on 28.4. 2017. The plaintiff annexed copies of documents to demonstrate that their father Lassie Bin Abdulla - deceased owned a house without land on the suit plot from 1952. That upon the demise of Lassie, the plot was offered for sale to them by the agents of the Land owners namely, Fourways. Accommodation Bureau vide their letter of 14th April 1987. The plaintiff deposed that as family, they contributed the money for the purchase of the plot (Kshs.15000) and gave to the Applicants' father who then was living in Mombasa. That the applicants' father remitted the money and a receipt was issued in the name of Lassie Bin Abdulla. As far as the plaintiff is concerned, the defendant acquired the title in her name fraudulently as this was family property.

4. The parties filed written submissions which I have read and considered together with the facts presented through the pleadings. The grounds for setting aside a consent order was well enumerated in the case of **Flora Wasike vs Destimo Wamboko (1982 – 1988) IKAR 625** to include; **if the consent was entered into by fraud, misrepresentation, error or mistake. A consent order is treated as a contract between two parties and is binding as between the parties to the consent. Similarly in the case of Board of Trustees NSSF vs Michael Owalo Cr. Appeal no. 293 of 2014**, the Court of Appeal found that a consent order cannot be varied or discharged unless on the grounds which would justify setting aside a contract.

5. The impugned consent order was reached between the advocates for the parties on record at the time. The applicants have annexed copies of their identification cards showing they were born in 1996 and 1997 respectively. This means that as at 2013 when this suit was filed and as at 13th November 2009 when the title deed was issued, they were still minors. **The title deed shows the property was issued in the joint names of their mother and themselves (through guardianship of their mother).** The suit was only commenced against their mother as the defendant. The law on joint ownership under section **91 (4) & (6) of the Land Registration Act** which was operational when this suit was filed requires that no tenant in common or joint tenant may transfer their interest inter vivos to another person without the consent of the co-owner which consent shall not be unreasonable withheld.

6. At the time of entering the consent on 28th October 2015, the applicants had obtained/reached the majority age. Therefore before their interest in the suit plot was severed, the defendant ought to have sought and obtained their consent. Nothing has been shown to the court that such consent was sought. On this account, the consent entered was made in error on the face of it and by mistake and therefore forms the first basis for setting it aside.

7. The plaintiff has raised several issues in his replying affidavit that the suit land was family property and thus the defendant obtained the title irregularly. This is an issue that would require evidence to be proved under the provisions of section 26 of the Land Registration Act which **“states that certificate of title is to be held as conclusive evidence of proprietorship except if it is proven to have been obtained by fraud or misrepresentation to which the person is proved a party to or where the title has been illegally or unprocedurally acquired.”** The letters being introduced by the plaintiff and the facts deposed on how they contributed money to acquire the plot can only become conclusive evidence if given under oath and the opposite party granted an opportunity to test its veracity. This cannot happen unless the order in place is set aside and the applicants joined in the proceedings. It is also clear there are several contentions issues that have been raised by both sides inter alia fraud; lack of authority and or consent to sever the applicants interest in the suit land which issues are best resolved by affording a hearing chance to all.

8. I am therefore persuaded that their grounds shown why the consent ought to be set aside. Accordingly I

shall allow application in terms of prayer (3) by joining the applicants as defendants to the suit and (4) by setting aside the consent order of 28. 10. 15 with unconditional leave to the defendants to file their respective defences within 15 days of the date of delivery of this ruling. The costs of this application to abide the winner of the case when it is concluded.

Dated and Delivered at Mombasa this 19th Day of January 2018

A. OMOLLO

JUDGE