



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 170 OF 2011

NATHAN JOES BARREH

RUTH JOEL BARREH.....PLAINTIFFS

VERSUS

1. MECHISADEK RAHUYA MONDI

2. HAMID SALIM

3. LEILA KHAMIS SHIKELY.....DEFENDANTS

JUDGMENT

1. The Plaintiffs moved this court by way of a plaint dated 20th June 2011 seeking for the following reliefs:

a. A declaration that the House without land comprising of four rooms and two stores on Plot. No.47/XVII, Kaloleni Mombasa housing one tenant namely SAID AHMED is and has always been in the property of the Estate of JOEL BARREH KAMUN, and the said estate of JOEL BARREH KAMUN is entitled to all due rents and income arising from the said property.

b. The land owner (currently administered by LEILA KHAMIS SHIKELY) is ordered by law to recognize the said estate and transfer the said house to the correct beneficiary (ies).

c. Costs and interest

d. Any other relief deemed fit by this Honourable Court.

2. The Plaintiffs have averred in the plaint that they are son and wife of Joel Barreh Kamun (deceased) and had brought the suit as the legal administrators of the Estate of the deceased. The plaintiffs further aver that the estate of the deceased comprised of several properties but the defendants are attempting to divest the estate of the deceased of the suit premises. The plaintiffs further aver and state that the said house is allegedly transferred by the landlord, the 3rd defendant, to one Leah Joel Kamun and later to one Ruth Kageha Mondhi (deceased) and now to one Hamid Salim the great granddaughter of the deceased.

3. The plaintiffs state that upon the demise of the deceased on 11th November 1981, the suit house was taken care of by Joel Kamun and the 2nd plaintiff herein. They further aver and state that the said house

without land on **Plot No.47 of Section XVII, Kaloleni Mombasa** has always been vested in the said Joel Barreh Kamun (deceased) and on his demise and upon transmission was vested on the beneficiaries of his estate who are listed as:

- i. Ruth Joel Kamun – (widow)
- ii. Nathan Joel Barreh – (son)
- iii. Ibrahim Buoro - (deceased son)
- iv. Anna Makini – (daughter)
- v. Samuel Joel Kamun – (son)
- vi. Assaph Joel Kamun – (deceased son)
- vii. Stephen Joel Lale – (deceased son)
- viii. Nuru Joel Lale – (son)
- ix. Leah Joel Barreh – (deceased daughter)

That the said Leah Joel Barreh begat Ruth Kageha Mondri (deceased) who begat Hamida Salim, the 2nd Defendant. The 1st Defendant is sued as a recipient of part of the rents as a father to Ruth Kageha Mondri, while the 3rd Defendant is sued as a necessary party being the current trustee of the landlord.

4. It is the Plaintiffs' contention that he 1st and 2nd defendants are strangers to the estate of the said Joel Barreh Kamun and any attempted ownership of the said house without land by them is illegal, null and void and that any purported receipt of rent is therefore a fraud on the estate and an illegal gain by the 1st defendant.

5. The Plaintiffs' claim against the 3rd defendant is that she must by right recognize the Administration of the suit house without land as part of the estate of Joel Barreh Kamun and for an order that she does endorse all necessary documentation to effect transfer. The said claim against the 2nd defendant was subsequently withdrawn.

6. By a statement of defence dated and filed on 26th September 2011, the 1st defendant denied the Plaintiffs' claim. The 1st defendant's substantive defence as set out in the said statement of defence is that the suit property being the house without land on **plot No.47 Section XVII situate at Kaloleni, Mombasa** was acquired and owned by Leah Joel Barreh since sometime in the year 1976. That subsequent to the demise of the said Leah Joel Barreh, the suit property devolved to and title thereto was formally transferred to Ruth Kageha Mondri.

7. The 1st defendant states and maintains that the suit property has never at any time constituted part of the estate of Joel Barreh Kamun (deceased) and that following the demise of Ruth Kageha Mondri on or above 14th June 2008, the suit property is vested in her estate with sole heir thereof being Hamida Salim. The 1st defendant further states that the confirmation of the Grant of Representation to the estate of the late Joel Barreh Kamun subsequent to the demise of Ruth Kageha Mondri was manifestly calculated to disinherit Hamida Salim of her inheritance rights in the suit property. The 1st defendant states and maintains that the estate of Joel Barreh Kamun is a complete stranger to the ownership and possession of the suit property and avers that the Plaintiffs' suit is misconceived, incompetent and otherwise an abuse of the due process of the court and that it does not disclose a cause of action against the 1st defendant and prays that the same be dismissed with costs.

8. By a statement of defence dated and filed on 17th August, 2011, the 3rd defendant states that she is one of the five (5) owners of the suit property and has been collecting ground rent for the house without land from one Said Ahmed who was a tenant to Leah Joel Kamun and her daughter Ruth who are both deceased, and that the suit property has been transferred to Ruth Kageni Mondri as the sole heir of the estate of Leah Joel Kamun. The 3rd defendant avers that the plaintiffs are unknown to her. It is the 3rd defendant's contention that the suit against her is bad in law for failure to sue the correct landlords and the issue of ownership of the house without land on their land ought to be solely resolved between the plaintiffs and the 1st and 2nd defendants, and pray that the suit be dismissed with costs.

9. The 1st Plaintiff testified as PW1 producing the plaintiffs' list of documents filed on 23rd June 2011 as P.exhibits 1 to 10. He testified that the 2nd plaintiff is his mother and that she died about five (5) years ago. He claims that his late father Joel Barreh Kamun bought the suit house without land on 13th February 1969 from one Mana Bint Humud Bin Amir Al-Shabibi who had purchased it from one Ali Bin Nasir Bashrahil. That since 1969, the house has never been transferred to anyone else. PW1 claimed that his deceased sister, Leah Joel Kamun was managing the house by collecting rent and taking it to their mother. He added that upon the demise of Leah Joel Kamun, his brother Samuel managed the house by collecting the rent. That there is a tenant by the name Said Ahmed who has been living in the house since the time of PW1's father and who in 2009 refused to pay rent and instead filed Mombasa SRMCC No.3665 of 2009 and was ordered to pay the rent to the Public Trustee. PW1 stated that the 1st defendant was a friend to his late sister Leah with whom they sired a daughter by the name Ruth Mondri. He denied that Leah Joel Kamun purchased the house from their late father, though he confirmed that the receipts for rent paid by the tenant were in her name. PW1 stated that since 1989, they have never paid ground rent. PW1 disputes the letter transferring the house from Leah Joel to Ruth Mondri and added that the issue of transfer should not have involved the Public Trustees.

10. On being cross examined by Mr. Manguro, learned Counsel for the 1st defendant, PW1 testified that the 1st defendant is not involved in any manner and that all he wants him to know is that the house was bought by his late father. Likewise in answer to questions put to him by Mr. Shikeley, learned Counsel for the 3rd defendant, PW1 stated that he had no case against the 3rd defendant who is the owner of the land in which the house without land stands on. He admitted as tenants, they are required to pay ground rent which has not been paid for many years.

11. PW2 testified that she wrote the letter dated 20th March, 2011 and filed in court on 23rd June 2011. She stated that she does not remember the late Leah Joel Kamun buying the suit house, adding that the same was purchased by her late father. She could not tell why they took long to take out letters of administration. PW2 further stated that after the demise of their father, her mother, who she said was elderly assigned her sister Leah Joel Kamun to collect rent from the suit house. It is her testimony that the 1st defendant is not entitled to anything from the estate of her late father. She added that they used to pay ground rent until they were asked to pay Kshs.30,000 to the Municipal Council of Mombasa so that they get entitled to the house. She further stated that she was not aware of any demand for payment of ground rent. According to PW2, the 1st defendant is interfering with the tenant over the payment of rent, adding that they had no dispute with the land owners, including the 3rd defendant.

12. The defendants did not call any witness.

13. M/s Akanga Alera & Associates Advocates for the Plaintiff filed written submissions on 9th October, 2018 while MR. S.R. Shikely counsel for the 3rd Defendant filed written submissions on 25th September 2018. The Plaintiffs' Counsel in his submissions reiterated the facts as pleaded in the plaint and the evidence adduced. He submitted further that the actions of the Public Trustee in relation to the suit property are null and void, adding that the 3rd defendant was sued for purposes of acknowledgement only.

14. Mr. Shikely submitted that there is no case whatsoever against the 3rd defendant, adding that the plaintiffs have not been able to sufficiently prove ownership of the suit house. It is further the 3rd

defendant's submissions that the Plaintiffs should have sued the public trustee and not the 1st and 3rd defendants herein.

15. I have considered the evidence on record, documents filed and the submissions on both sides. The dispute herein is over the ownership of the house without land on **Plot No.47 Sectoin XVII, Kaloleni, Mombasa**. The Plaintiffs claim that the said house belonged to the late Joel Barreh Kamun (deceased) and on his demise the same should be vested in his estate and transmitted to the beneficiaries of the estate. The uncontroverted evidence before me is that one of the deceased's daughters, Leah Joel Barreh who is also deceased has laid claim to the said house. Upon the demise of Leah Joel Barreh the suit property was vested in her daughter, Ruth Kegaha Mondi who also passed on and the property was vested in her daughter Hamid Salim, the 2nd defendant herein. The suit against the 2nd defendant was withdrawn.

16. The first issue that arises is whether the plaintiff's suit discloses any cause of action against the 1st and 3rd defendants.

17. From the Plaint and the evidence on record, the Plaintiffs have not made any claim against the 1st defendant. It is not clear on what basis the plaintiffs have included the 1st defendant in these proceedings. The 1st defendant had not laid a claim on the suit property neither has any evidence been led to show how he has interfered with plaintiffs' rights over the suit property. In my considered view the plaintiffs' herein had not disclosed any cause of action against the 1st defendant. Indeed while being cross-examined by the counsel for the 1st defendant, the 1st plaintiff admitted that the 1st defendant is not involved in any manner over the suit property.

18. As regards the claim against the 3rd defendant, all that the plaintiffs are seeking is a recognition of the estate of the deceased and a transfer of the suit house to the correct beneficiary/beneficiaries. In my view, the correct beneficiaries of the estate of the decease can only be ascertained in a succession cause.

19. From the evidence on record, it is clear that the plaintiffs' claim if any, is against the 2nd defendant and probably the public trustee. This court notes that the suit against the 2nd defendant was withdrawn. In addition, there is no suit against the Public Trustee. The Plaintiffs are seeking to have the actions of the Public Trustee in relation to the suit property declared null and void. The issue that arises is whether the court should grant orders whose effect would be to bind non-parties to the proceedings.

20. In the Plaint, serious allegation have been made against the late Leah Joel Kamun, the late Ruth Kageha Mondi, Hamid Salim and the Public Trustee all of whom are not before this court and this court is being invited to make orders affecting their rights and actions. There was no case files against the estate of Leah Joel Kamun and the estate of the late Ruth Kageha Kamun as well as the Public Trustee. No explanation was offered for not joining them yet disparaging allegations have been made against them. The suit against Hamid Salim was withdrawn by the Plaintiffs.

21. In my view, a person who is not a party to the legal proceedings cannot have their rights taken away even by judicial pronouncement without affording the affected persons the opportunity of being heard. Such a decision will have been arrived at in total breach of the rules of natural justice, and it would be unconstitutional and a mockery of justice.

22. Evidently, the orders sought in this suit if granted, will affect the estate of Leah Joel Kamun, the estate of the late Ruth Kageha Mondi and of Hamid Salim as well as the Public Trustee who are not parties to this case. To me, such a scenario poses a danger of granting orders affecting other persons without giving them the benefit of a hearing. In any event, the suit as against the 1st and 3rd defendants has not been proved to the required standards. From the evidence on record, there is clearly no case made out by the plaintiffs against the 1st and 3rd Defendants. The plaintiffs' suit cannot stand.

23. The upshot is that the plaintiffs' suit is hereby dismissed with costs to the 1st and 3rd defendants.

Dated, signed and delivered at Mombasa this 17th day of December, 2018.

C. K. YANO

JUDGE