



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO.16 OF 2002

RAMADHAN IDD.....1ST PLAINTIFF
FATUMA IDD.....2ND PLAINTIFF
RIZIKI IDD ALI.....3RD PLAINTIFF
HALIMA IDD RAMADHANI.....4TH PLAINTIFF
ATHMAN OMAR BIMMA.....5TH PLAINTIFF
ALI OMARI BIMMA.....6TH PLAINTIFF
MOHAMMED HASSAN.....7TH PLAINTIFF
ABDU HASSAN.....8TH PLAINTIFF
AMINA HASSAN.....9TH PLAINTIFF
RIZIKI HASSAN.....10TH PLAINTIFF

VERSUS

AGENT OF THE PUBLIC TRUSTEE
FOR KILIFI, LAMU DISTRICTS.....1ST DEFENDANT
OMAR ABDALLA.....2ND DEFENDANT
ABBAS ABDALLA.....3RD DEFENDANT
ABDULKARIM ABDALLA.....4TH DEFENDANT
AISHA ABDALLA.....5TH DEFENDANT
ASHRAF ABDALLA.....6TH DEFENDANT
LATIFA ABDALLA.....7TH DEFENDANT

FATMA ABDALLA.....8TH DEFENDANT

THE LAND REGISTRAR, MOMBASA.....9TH DEFENDANT

RULING

1. In the Application dated 8th July, 2016, the 2nd-8th Defendants/Applicants are seeking for the following orders:

a. That the court be pleased to review its judgment as there appears to be an error which the Honourable court can correct.

b. That the court do issue any other orders it deems fit and fair to grant.

c. Costs of the Application.

2. The Application is premised on the grounds that the court came up with a finding that the 2nd - 8th Defendants paid kshs. 68,571.20 to the 1st Defendant; that the court held that the 1st Defendant could administer 2/7 share of the late Haji Juma Haji and not the entire property and that the court did not order the 1st Defendant to refund the kshs.68,571.20 paid to its office by the 2nd-8th Defendants together with interest.

3. In response, the Plaintiffs filed Grounds of Opposition and a Replying Affidavit.

4. According to the Plaintiffs, the court in its judgment nullified the sale reflected through an instrument of transfer dated 16th October, 1989 on account of illegality; that the interest of Haji Juma Haji was not severable from the illegal transaction and that money paid under an illegal contract is not recoverable.

5. The Plaintiff's and the 2nd-8th Defendants' advocates filed brief submissions which I have considered. I have also considered the authorities that were filed alongside those submissions.

6. The issue that was before the court in this suit was whether the Agreement that was entered into between the 1st Defendant and the 2nd-8th Defendants in respect to a conveyance dated 16th October 1989 was null and void. In its Judgment of 13th November, 2015, the court held as follows:

“63. Having not registered the summary certificates for the other co-owners, the 1st Defendant had no legal mandate to transfer the entire suit property to Mr. Omar, Latifa and Fatma on 3rd September, 1992 as he purported to do.

64. The transfer document signed by the 1st Defendant transferring the suit property to some of the Defendants had the effect of disinheriting the other beneficiaries, whose parents were registered as co-owners of the suit land.

65. the transaction between the 1st Defendant and the 2nd-8th Defendants was therefore tainted with illegality... The status quo prior to the transactions of 3rd September, 1992 should be upheld.”

7. According to the Applicants, the court erred by not pronouncing that the 2nd -8th Defendants are entitled to 2/7 share of Haji Juma Haji and that the court did not direct the 1st Defendant to refund the kshs. 68.571.20 paid to its office by the 2nd-8th Defendants.

8. The issues that the Defendants are raising in the Application were not before the court.

9. Indeed, having found in its judgment that Haji Juma Haji was entitled to 2/7 undivided shares in the suit land, the court was not under any obligation to restate that position in its final orders, and especially in a situation where the 2nd-8th Defendants had not sought such a prayer by way of a counter-claim.

10. The court was not also not called upon by the 2nd-8th Defendants to declare that the 2nd-8th Defendants were entitled to the refund of the moneies paid to the 1st Defendant.

11. Having failed to file a counter-claim, the 2nd-8th Defendants cannot now assert that the court erred by not dealing with issues which were not before it in the first place.

12. For those reasons, there is no error apparent on the face of the record to warrant the review of the Judgment and Decree of 13th November, 2015.

13. In the circumstances, the Application dated 8th July, 2016 is dismissed with costs to the Plaintiffs.

DATED AND SIGNED AT MACHAKOS THIS 2nd DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12th DAY OF MAY, 2017.

J.O. OLOLA

JUDGE