



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT NO.98 OF 2015 (O.S.)

MAHMOUD OMAR.....PLAINTIFF

VERSUS

AWADH SWALEH SAID.....DEFENDANT

SAID SWALEH SAID.....DEFENDANT

MOHSIN SWALEH SAID.....DEFENDANT

OMAR SALEH SAID.....DEFENDANT

JUDGEMENT

1. Mahmoud Omar, hereinafter referred to as the plaintiff, brought this suit vide Originating Summons dated 14th may, 2015 and filed on even date. The plaintiff seeks an order that Awadh Swaleh Said, Said Swaleh Said, Mohsin Swaleh Said and Omar Saleh Said, hereinafter referred to as the defendants, be compelled to sign transfer documents for transfer of Land **Title Number MOMBASA/BLOCK XLIV/123** being $\frac{3}{4}$ the share of land partitioned from **Land Title Number Mombasa/Block XLIV/102** to the plaintiff's name, and in default by the defendants, the Registrar to be ordered to effect the transfer on behalf of the defendants.

2. The summons is supported by the plaintiff's affidavit sworn on 14th May 2015. The defendants were served but did not enter appearance within the stipulated time or at all. The case therefore proceeded ex-parte and the plaintiff testified on 13th March 2017.

3. The plaintiff stated that on 26th January, 1996, he purchased a quarter ($\frac{1}{4}$) share of **Title Number Mombasa/Block XLIV/102** from the Trustees of NASSERPURIA MEMON JAMAT. He further stated the defendants are tenants in common with the plaintiff over the suit property. The plaintiff produced the transfer which was executed by the trustees who sold him the plot. He also produced a title deed showing the plaintiff as proprietor of $\frac{1}{4}$ of the plot.

4. The plaintiff further stated that the suit property has since been partitioned into three parcels, namely **Title Numbers Mombasa/Block XLIV/123, 1 Mombasa/Block XLIV/124 and 1 Mombasa/Block XLIV/125**. He stated that the reason for the partition was to enable him to hold his portion separately from the rest of the proprietors. The title deeds were produced as exhibits.

5. According to the plaintiff, following the partitions, his entitlement fell On **Title No. Mombasa/block XLIV/123**. However, even after the sub-divisions, the plaintiff is still jointly registered as an owner together with the defendants in all the three sub-divisions. The plaintiff stated that to finalize the process

and aim of the sub-division, the defendants were required to transfer the share they had in the land parcel **NO.MOMBASA/BLOCK XLIV.123** and in turn the plaintiff transfers his shares in land **PARCEL NO.MOMBASA/BLOCK XLIV/124** and **MOMBASA/BLOCK XLIV/125** to the defendants.

6. The plaintiff stated that he took the transfers to the defendants to execute but they refused to do so, forcing the plaintiff to seek legal redress in court. The transfer forms that the plaintiff has signed but which the defendants have not signed were produced as exhibits. The plaintiff also produced a demand letter written by his advocates to the defendants but which the defendants also ignored.

7. I have carefully considered the pleadings filed, the evidence on record, the submissions, made and the relevant laws.

The issue for determination is whether the plaintiff has proved his case on a balance of probabilities, and if so whether he is entitled to the orders sought. The plaintiff is seeking an order compelling the defendants to sign transfer forms for **TITLE NO. MOMBASA/BLOCK XLIV/123** in his favour.

From the evidence on record, the plaintiff purchased a quarter (1/4) share of land **TITLE NO. MOMBASA/BLOCK IXLIV/102** from erstwhile proprietors who owned the same as tenants in common. The title deed produced as an exhibit showed that the defendants held three-quarter (3/4) share of the said land in their capacity as trustees of a Wakf. The land has been partitioned or sub-divided and all that the plaintiff is desirous is to hold his share in his sole title deed. The plaintiff has requested the defendants to execute the transfer documents to complete the partition process but the defendants have failed to execute the same. The defendants' inaction has prompted the plaintiff to file this suit.

8. Section 94 of the Land Registration Act provides for a severance of common tenancy by way of a partition and provides as follows:

“(1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any consent or conditions in a certificate of a land, the Registrar shall effect the partitions of the land in accordance with the agreement of the tenants in common.

(2) An application may be made to the Registrar in the prescribed form for an order for the partition of land owned in common by –

a) any one or more of the tenants in common without the consent of all the tenants in common ”.

9. It is clear from the evidence on record that the suit property has already been partitioned into three parcels. The title deeds resulting from the partitions were produced as exhibits 3,4 and 5. The reason for the partition was to enable the defendants and the plaintiff to each own their share separate from the other. The plaintiff's claim is not for an order for partition, but rather the execution of the transfer documents to give effect to partition already undertaken.

In my view, it was perfectly in order for the plaintiff to have moved the court for appropriate orders as the defendants had unreasonably refused to execute the transfer documents and holding the plaintiff at ransom. The defendants have not proffered any reasons for declining to sign the transfer forms. As rightly submitted to by the plaintiff's counsel, it can be rightly inferred that the defendants are unreasonably blocking the attempts of the plaintiff to rightly own his share of the land independently from the defendants.

10. I am satisfied that the plaintiff has proved his case on a balance of probabilities. Consequently, I enter judgment for the plaintiff against the defendants in terms of prayers (1) and (2) of the Originating Summons. The plaintiff is entitled to costs of this suit.

It is so ordered.

Dated, signed and delivered at Mombasa this 15th day of June 2017.

C. YANO

JUDGE