



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.107 OF 2015
(formerly Mombasa 119 of 2015)

HARUN RASHID KHATOR.....PLAINTIFF/RESPONDENT

=VERSUS=

ABDULRAZAK KHALIFA.....1ST DEFENDANT/APPLICANT

TEOPSTA MKIWA MWAZINGHE.....2ND DEFENDANT

R U L I N G

1. The Application by the 1st Defendant dated 13th January 2015 is seeking for the following orders:
 - (a) That the suit against the 1st Defendant herein is struck out, dismissed or stayed generally, with costs for this application and the suit, to the 1st Defendant on the grounds that:
 - (i) The cause of action pleaded herein, which is disputed, is for the High court, and not the Environment and Land Court:
 - (ii) The cause of action is, in any event, res judicata having been decided more than once by a court of competent jurisdiction in Mombasa High Court Succession Cause Number 39 of 1943; in the matter of the Estate of Khator Bin Salim (Deceased).
 - (iii) Plot number 2840/III/MN and 2845/III/MN were never registered against title 189/III/MN and never had a life of their own.
 - (iv) The Plaintiff, or his predecessor in title, never have plot numbers 189/III/MN; 2840/III/MN, all of section III Mainland North, registered in their name(s);
 - (v) Sub-divisions created from plot 189/III/MN (i.e plot 3205/III/MN and 4750/III/MN) were alienated to third parties with sanction or leave of court; and concurrence of the beneficiaries;
 - (vi) A deed plan does not confer title to land, or a registrable interest

in land, unless it is registered against the mother title.

(b) The suit herein is discriminatory and an abuse of the court process, improperly brought against one of two surviving administrators, on the ground that:

(i) Two or more administrators in respect of one estate are at law one, and must sue or be sued as such;

(ii) The Plaintiff has left out his brother in law, the second administrator of the estate of Khator Bin Salim, Mr. Mohamed Bwana Bwanaadi;

(iii) The omission of one administrator, either as a Plaintiff or a Defendant in the suit is fatal to the proceedings.

(c) The costs of this application, and of the suit if this application is allowed, are provided for.

The 1st Defendant's/Applicant's case:

2. The 1st Defendant deponed that the suit is for recovery of parcels of land number 2840 and 2845 Section III Mainland North which were never registered as independent titles having been consolidated to form sub-division number 4750 which was sold in a public auction.
3. It is the 1st Defendant's case that having been sued alone, the suit is incompetent; that the Plaintiff's suit is res judicata and that the issue of subdivision of plot number 189/III/MN and subsequent consolidation and sale of the consolidated plots was done with concurrence of court and that it is the Plaintiff's brother in law who brought about the suit in which a decree was executed by attachment of plot 187 and 189/III/MN.

The Plaintiff's/Respondent's case:

4. The Plaintiff deponed that his main complaint is that the 1st Defendant did not have the capacity to occasion the sale of the suit property, which issue has never been canvassed; that the issues that have been raised in the Application should be dealt with at trial and that the cause of action arose when the 1st Defendant was acting as a sole administrator rendering him capable of being sued alone.
5. I have considered the submissions filed by the 1st Defendant's counsel and the Plaintiff's counsel. I have also considered the authorities that were filed by the Plaintiff's counsel.

Analysis and findings:

6. In the Plaint dated 2nd June 2015, the Plaintiff has described himself as the legal administrator of the Estate of Rashid Khator Salim (deceased) having obtained a grant which was confirmed on 24th March 2006.
7. According to the Plaint, in the year 1996, plot number 189/III/MN was subdivided to create plot numbers 2839-2866 and that plot numbers 2850 to 2855 were consolidated to form plot number 3205 while plot numbers 2839 to 2849 and 2856 to 2866 were consolidated to form plot number 4750 (the suit property).
8. The Plaintiff averred in the Plaint that after the sale of plot number 3205 pursuant to an order in Succession Cause Number 39 of 1943, each beneficiary was issued with a deed plan showing the area that each was to inherit; that his father signed for plot numbers 2840 and 2845 and that by way of an order of 29th May 2007, the 1st Defendant was mandated by the court to carry out the distribution of plot numbers 2838 to 2849 and 2856 to 2866.
9. It is the Plaintiff's case that in disregard to the order of the court, the 1st Defendant consolidated

- plot numbers 2838 to 2849 and plot numbers 2856 to 2866 to one plot being plot number 4750 which he illegally sold to the 2nd Defendant; that plot numbers 2840 and plot number 2845 were to devolve to his father one Rashid Khator and that the said transfer is unlawful and void.
10. The Plaintiff is seeking for a declaration that the consolidation of plot numbers 2839 to 2949 and 2856 to 2866 was irregular and unlawful; a declaration that the sale and transfer of plot number 4750/III/MN by the 1st Defendant to the 2nd Defendant was null and void and for revocation of certificate of title number CR. 42961 issued to the 2nd Defendant.
 11. On the face of the Plaint, this court has jurisdiction to deal with the suit considering that the dispute involves the alleged unlawful transfer of plot number 4750 by the 1st Defendant to the 2nd Defendant.
 12. However, the 1st Defendant has raised an objection on the ground that the issues that are being raised in the current suit were dealt with in Mombasa Succession Cause No. 39 of 1943 in the matter of the Estate of Khator Bin Salim.
 13. It is not in dispute that plot number 4750/III/MN is one of the subdivisions that arose from plot number 187/III/MN.
 14. From the Plaintiff's averment, plot number 187 was subdivided into numerous plots, to wit plot numbers 2839-2866 before plot numbers 2839-2849 and 2856-2866 were consolidated to form plot number 4750 (the suit plot).
 15. The Plaintiffs claim is that his late father, who is supposed to be one of the beneficiaries of the Estate that the 1st Defendant was administering, was entitled to plot number 2840 and plot number 2845.
 16. The Plaintiff's claim therefore is that the 1st Defendant being one of the administrators, of the Estate of Khator Bin Salim in Mombasa Succession Cause Number 39 of 1943 defrauded his father by selling what his father was entitled to the 2nd Defendant.
 17. If that is the case, and considering that the court in Mombasa Succession Cause Number 39 of 1943 allowed the 1st Defendant to complete the administration of the Estate of Khator Bin Salim and execute such instruments as may be necessary. The Plaintiff's claim should be raised in Succession cause number 39 of 1943.
 18. I say so because, other than the court allowing the 1st Defendant to distribute the Estate of Mr. Khator, the Plaintiff's siblings, vide an Application dated 22nd July 2008, sought for an order of the court to set aside the transfer, deposition and alienation of plot number 4750/III/MN by the 1st and 2nd Defendant, (who were also the the 1st and 2nd Respondents in Mombasa Succession Cause Number 39 of 1943).
 19. While dismissing the Application in Succession Cause No. 39 of 1943, filed by the the Plaintiff's siblings, including his brother-in-law, Njagi J observed that the sale of the suit property had been authorised by Waki J (as he was then) in a Ruling dated 24th September 1999.
 20. Indeed, Njagi J proceeded to deal with the issue of whether plot number 4750/III/MN was lawfully sold to the 2nd Defendant by the 1st Defendant as follows:

“No evidence of any fraud or misrepresentation to which the 2nd Respondent (who is also the 2nd Defendant herein) has been a party has been pleaded or adduced to challenge that title. In the circumstances, I find that she is the absolute and indefeasible owner of the subject property, and any plea to the contrary is bound to fail.”

21. How can this court now open up the issue of whether the suit property was or was not fraudulently sold to the 2nd Defendant? That issue was conclusively dealt with in Mombasa Succession Cause Number 39 of 1943. The Plaintiff 's only option is to either move the court in Succession Cause NO. 39 of 1943 to set aside its decision or to appeal against the decision. The Plaintiff cannot re-litigate the propriety of the sale of plot no.4750 by the 1st Defendant to the 2nd Defendant.
22. In the circumstances, I find and hold that this suit is res judicata.
23. For those reasons, I dismiss the Plaintiff's suit with costs.

Dated and delivered in Malindi this **13th** day of **November** 2015.

O. A. Angote

Judge