



REPUBLIC OF KENYA



KENYA LAW
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**Adam v Adam & 3 others (Civil Appeal 103 of 2019)
[2022] KECA 501 (KLR) (1 April 2022) (Judgment)**

Neutral citation: [2022] KECA 501 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 103 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 1, 2022**

BETWEEN

ABDULRAZAK ABDULREHMAN ADAM APPELLANT

AND

ASLAM ABDULREHMAN ADAM 1ST RESPONDENT

SHAMIM ABDULREHMAN ADAM 2ND RESPONDENT

KHATIJABAL ABDULREHMAN ADAM 3RD RESPONDENT

SERABANU ABDULREHMAN ADAM 4TH RESPONDENT

*(An appeal from the judgment of the Environment & Land Court at
Mombasa (Yano, J.) delivered on 1st April 2019 in ELC Case No. 91 of 2011)*

JUDGMENT

1. In this appeal, the appellant, Abdulrazak Abdulrehman Adam (“the appellant”), has challenged a judgment of the Environment and Land Court at Mombasa (Yano, J.) delivered on 2nd April 2019 dismissing his suit. In that suit, the appellant sought nullification of a transfer of a property known as Mombasa/Block XXXIII/19 (“the Property”) in favor of his siblings, Aslam Abdulrehman Adam, Shamin Abdulrehman Adam, Khatijabai Abdulrehman Adam and Serabanu Abdulrehman Adam, the 1st to 4th respondents respectively.
2. By a Transfer dated 31st March 2008, Sakinabai Haji Abdulla Ibrahim, the then registered owner of the Property and the mother of all the parties hereto, transferred it to the 1st respondent. In his re-amended plaint, the appellant averred that his brother, the 1st respondent, who was ordinarily resident in United Kingdom, visited Kenya and caused their mother to transfer the Property to him to “the exclusion of all other children and beneficiaries” of their mother. He pleaded that their mother was at the time severely ill, “in a very poor condition suffering from Metastatic Transitional Cell Carcinoma of the bladder



- and asitis with renal failure” and later died in Mombasa on 27th April 2008. The appellant contended that their mother did not sign the Transfer in favour of the 1st respondent as she “was not in a fit state to understand and sign the transfer”; that alternatively, if she signed the transfer, her signature on the same “was obtained fraudulently” or alternatively, “was obtained by undue pressure” on her.
3. The particulars of fraud and duress pleaded in the re-amended plaint were that: the 1st respondent had explained to their mother, Sakinabai Haji Abdulla Ibrahim (their mother), that the transfer was to be in favor of the five siblings who are the parties to this appeal; that some or all of the respondents or the 1st respondent alone caused their mother to sign the transfer when she was so very ill and when she did not know what she was doing; that the 2nd respondent, or the other respondents or all of them together, threatened their mother “who was a dying person” that they would beat her if she did not sign; and that their mother was made to sign the transfer when she could not have known or been aware of its full significance.
 4. The respondents denied the appellant’s claims. They pleaded that their mother “of her own free will and mind decided to transfer” the property to reflect the wishes she had earlier indicated in her Will; that the transfer was prepared and done by K.M. Karimbhai Advocate; that the transfer by their mother to 1st respondent did not reflect the names of the other respondents; that the 1st respondent subsequently surrendered the title and the same was issued in the names of all four respondents.
 5. At the trial only the appellant testified in support of his case. The 2nd respondent was the sole witness for the respondents. The appellant’s testimony was that he, and his siblings, were raised on the Property where both their parents also lived; that the 1st respondent caused their mother to transfer the property to him when she was sick; that their mother had been treated in Mombasa and then transferred for treatment to Nairobi where the doctor informed them that her condition was bad and that she could not last beyond 30 days; and that she died within 28 days thereafter on 27th April 2008.
 6. The appellant testified further that he used to live with the mother in his home but the 1st respondent relocated her to the Property; that he then came to learn that the mother had transferred the Property to the 1st respondent alone; that as one of the children, he did not see that it was right; that under Islamic law, the Property belonged to the entire family as it had been given to their mother as a gift; that while their mother was “still in her senses” she had told him to take care of his sisters and his intention was to maintain the Property within the family and not to be sold.
 7. It was the appellant’s contention that the transfer to the 1st respondent was void ab initio or voidable and that he had placed a caveat on the property. He stated that he was not aware that his mother had prepared a Will but came to learn of it after two years; and that she had told him that the Property belonged to all her children. He tendered into evidence as exhibits copy of the Title Deed; Transfer dated 31st March 2008; stamp duty declarations forms; death certificate; caution; and correspondence from Karimbhai Advocate.
 8. Under cross examination the appellant reiterated that the Property is for the whole family and his interest was to ensure that it was not sold; that he only sued his brother, the 1st respondent, with whom he had grievance and had not (though the pleadings showed otherwise) sued sisters, the 2nd to 4th respondents. He stated that his “mother was of good mental health save that she was in pain”; that he was not aware of the contents of the caution he registered against the title; that in the caution he did not mention mental illness and only mentioned old age; that although in his reply to defence he had pleaded that the Will of their mother was not genuine, he had not challenged it in court.
 9. He stated further that he did not know if the signature on the transfer in favour of the 1st respondent belonged to their mother; that he knew Karimbhai advocate, and the transfer was signed before him



on 31st March 2008; that Karimbhai advocate had confirmed in a letter to his advocates, Atkinson Cleasby and Satchu Advocates, that the transfer was signed in his presence; that in 2006 the mother was still well and used to be taken to hospital by the 2nd respondent and that he would sometimes do so. He stated that the particulars of fraud in the pleadings “were written by [his] advocate”.

- 10 In re-examination, the appellant reiterated that his “mother was sick but her mental status was okay” and that he was surprised that she discriminated against her children and that she (the mother) ought to have given the property “to all her children.” With that, the appellant’s case was closed.
- 11 In her testimony, the 2nd respondent, testifying for the respondents adopted her written witness statement dated 28th September 2012 in which she stated that their mother made a Will in 2006 in which she expressed her wishes regarding the Property; that it was the mother’s wish that the property be transferred to the respondents with the 2nd to 4th respondents having a life interest provided they remained unmarried; that in 2008, their mother of her own free will transferred the Property to the 1st respondent; that because that transfer did not reflect the names of the 2nd to 4th respondents, the 1st respondent willingly transferred the title to the four of them; that she did not in any way force their mother to transfer the Property; that their mother was displeased with the other children who were left out of the Property; that the appellant had filed a caution against the title but after deliberations before the Land Registrar, the caution was removed and the property registered in the names of the respondents.
12. Under cross examination, the 1st respondent stated that their mother had fractured her back when she fell and taken to hospital; that the mother got sick in 2007 and that she was hospitalized in MP Shah Hospital in Nairobi, that on return from hospital the mother stayed with them at the house on the Property until her death in April 2008; that the transfer in favour of the 1st respondent was signed at home in her presence and in the presence of the 3rd and 4th respondents and Karimbhai Advocate; that the mother was unhappy with her brothers who were excluded; that the Property was given to their mother as a wedding gift; and that at the time of trial, the 2nd to 4th respondents were living in the house on the Property.
13. After reviewing the evidence and submissions, the learned Judge delivered the impugned judgment in which he identified two issues, namely, whether the Property was lawfully transferred to the 1st respondent; and, whether the appellant was entitled to the reliefs he sought. The Judge found that as the registered owner of the Property, the mother had all the rights to the same including the right to transfer it and rejected the appellant’s claim. The Judge discredited the appellant’s assertion that the suit was an altruistic act out of concern for his sisters. The Judge observed that contrary to the appellant’s assertion in evidence that he was only aggrieved by and only sued the 1st respondent, the pleadings showed otherwise as the sisters had been joined in the suit as defendants. In that regard, the Judge stated:

“However, if the plaintiff’s concern for bringing the suit was the welfare of his sisters, the evidence that has emerged is that the 2nd, 3rd and 4th defendants are now the registered owners of the suit property alongside the 1st defendant. It is therefore my view that the plaintiff’s concern, whatever its worth, has been achieved.”
14. Urging the appeal before us, learned counsel for the appellant Mr. Ngonze highlighted his written submissions. He referred to the memorandum of appeal in which the appellant has challenged the judgment on three grounds, namely, that the Judge was wrong in: finding that the Property was lawfully transferred to the 1st respondent; finding that the appellant was not entitled to the reliefs that



he sought; and failing to appreciate the peculiar circumstances pertaining to the appellant's claim and thereby arriving at an erroneous decision.

15. Counsel submitted that the mother was unwell for a long time; that the evidence led before the trial court established that the transfer in favour of the 1st respondent was not genuine; that had the Judge analyzed the evidence properly, he would have concluded that the transfer was not done willingly.
16. The 2nd and 4th respondents appeared in person on their own behalf and on behalf of the 1st and 3rd respondents. Their advocates were granted leave to cease acting by the Court on 23rd July 2021. In their brief submissions, the respondents stated that their mother prepared her Will before a lawyer in 2006; that the transfer by their mother in favour of the 1st respondent in 2008 was done in the presence of an advocate; that they looked after their parents who said they would leave the house to them; that they are not married and have nowhere to go. They prayed that the appeal be dismissed.
17. Having reviewed the record and the submissions, the main issue in this appeal is whether the appellant established, as he pleaded, that the transfer in favour of the 1st respondent was obtained by fraud or duress. In other words, whether the Judge was right in concluding that the transfer of the Property to the 1st respondent was valid.
18. The particulars of fraud and duress based on which the appellant attacked the transfer of the property in favour of the 1st respondent have been reproduced above. In *Vijay Morjaria vs. Nansingh Maddhusing Darbar & another* [2000] eKLR, Tunoi, JA stated:

“It is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleading. It is also settled law that fraudulent conduct must be distinctly alleged and distinctively proved and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis]

19. In *Kinyanjui Kamau vs. George Kamau* [2015] eKLR, the Court restated the principle that allegations of fraud must not only be pleaded but must be strictly proved. The Court cited with approval the earlier statement by the Court in *Ndolo v Ndolo (2008) 1 KLR (G&F) 742* as follows:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

20. In addition to fraud, the appellant also pleaded, as already mentioned, that the transfer in favour of the 1st respondent was obtained by duress. Duress is defined in Black's Law Dictionary as “a threat of harm made to compel a person to do something against his or her will or judgment.” See also *Kenya Commercial Bank Limited & Another vs Samuel Kamau Macharia & 2 Others* [2008] eKLR. In *Ghandhi & Another vs Ruda (1986) KLR 556*, it was stated that:

“Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal in the sense that it must be a threat to commit a crime or tort.”



21. With those principles in mind, what evidence did the appellant present? It is interesting, that in the course of his testimony the appellant appeared to disassociate himself from the pleas of fraud and duress when under cross examination he stated that, “the particulars of fraud list were written by my advocate.” Nevertheless, there was evidence, in the form of a doctor’s medical report by a consultant urological surgeon, Mr. Naji Said, that the mother was admitted to MP Shah Hospital in March 2008 and diagnosed with anaemia, renal failure and an extensive bladder tumour with metastasis; that she was transferred back to Mombasa where she stayed in the Property with the respondents being managed with palliative care until her demise on 27th April 2008.
22. However, the appellant’s testimony was that the mother was suffering from cancer and that she “was of good mental health save that she was in pain”; that when he lodged a caution against the title, he did not mention mental illness but only mentioned old age; that in 2006 when she did her Will, she was “still well”. He again reiterated under re-examination that “my mother was sick but her mental status was okay.”
23. The appellant went on to state that although he did not know “if the signature in the transfer belongs to [his] mother”, it “was signed on 31st March 2008 before Karimbhai advocate”. He stated that under Islamic law, the Property belonged to the entire family as it had been given to their mother as a gift; that he did not see that it was right for their mother to have transferred it to the 1st respondent alone.
24. It is apparent from the foregoing therefore that beyond the appellant’s plea of fraud and duress in his re-amended plaint, he offered no evidence whatsoever to support those pleas. Based on our review and evaluation of the record, no evidence whatsoever was tendered to support the pleas that the mother was coerced into signing the transfer, or that the signature on the transfer in favour of the 1st respondent was not hers; or that she was not in a frame of mind to do so.
25. We are therefore in agreement with the learned Judge in concluding:
- “Having found that the transfer of the suit property from the deceased to the 1st defendant was valid, I also find that the subsequent transfer from the 1st defendant was valid. From the material placed before me, I am not satisfied that the plaintiff has proved, his case on a balance of probabilities.”
26. We also agree with the trial Judge when he expressed in the judgment that:
- “In my view, the deceased as for proprietor (sic) was not bound to consult her children when she wanted to transfer the property. There was no trust relationship as concerned the land between the proprietor and her children. The deceased being the registered proprietor of the suit property had indefeasible title under Section 25 and 26 of the *Land Registration Act* (or section 27 and 28 of the repealed Act) unless proved she acquired the title fraudulently. In this case, there was no allegation that the deceased acquired the title fraudulently.”
27. The appeal has no merit. It fails and is dismissed. Considering the parties are siblings, we order that each party will bear their own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF APRIL 2022.

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL



P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

