



Ali v Ali (Suing in Her Personal Capacity and as Personal Representative of the Estate of Hafidh Badi Sanifu, Deceased) (Environment & Land Case 206 of 2015) [2024] KEELC 6086 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6086 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 206 OF 2015
SM KIBUNJA, J
SEPTEMBER 25, 2024
[FORMERLY MOMBASA MISC. CIVIL APPL. NO.12 OF 2015 (OS)]

BETWEEN

ALI MSELEM ALI APPLICANT

AND

REHEMA BADI ALI (SUING IN HER PERSONAL CAPACITY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HAFIDH BADI SANIFU, DECEASED) RESPONDENT

JUDGMENT

1. The applicant commenced this suit through the originating summons dated 9th April 2015, seeking for inter alia, an order to compel the respondent to transfer MN/11/2754, suit property, measuring 0.2935 hectares to the applicant and costs. The application is based on the seven (7) grounds marked (1) to (7) on its face, and supported by the affidavits of Ali Msellem Ali, applicant, sworn on the 9th April 2015, 19th September 2016 and 26th January 2018, inter alia deposing that he entered into a sale agreement for half acre out of MN/11/114, the original property, with the original owner on the 3rd November 1978; that on the 19th January 1990, the respondent executed the transfer but it was rejected on being presented for registration; that original property was subdivided to create among others plot No. 1012, that included his half acre and registered with the respondent on 27th March 1992; that he has been unsuccessful to have his half acre registered in his name though he has applied severally; that the respondent who is the administrator of the estate of Badi Ali Sanifu, has totally refused to register the half acre in his name; that he had fully paid for the plot and it was unfair for the respondent to demand to be paid Kshs.400,000; that the other suits were never determined on their merits, but were withdrawn and dismissed for non-attendance; that he had paid the surveyor's fees and caused a survey of his plot and deed plan No. 141469 dated 23rd November 1989 for plot MN/11/2754 was prepared.



2. The claim is opposed by Rehema Badi Ali, the respondent, through her affidavits sworn on the 19th October 2015, 29th September 2016 and 5th February 2018, in which she inter alia deposed that the applicant had not disclosed having sued her in three other suits; that the claim herein is not suitable to be brought through originating summons; that though the applicant had shown her and her late brother copies of the sale agreement and receipt after the death of their father, they had serious doubts about them, as he did not produce the original copies; that they had agreed to proceed with the sale but on increased purchase price of Kshs.400,000, which the applicant has not paid, but instead presented the transfer for registration, which was declined; that the transfer and subdivision creating MN/11/2754, under deed plan No. 141469, that the applicant relied on were not known to her; that she has been paying rent for plot No. MN/11/1012, and the applicant has been residing on a portion of that plot without paying rent, and he should refund to her a fair share of it; that she has doubts on whether her late father had received any payment of the purchase price as alleged; that the applicant is yet to pay her costs for the previous suits that were dismissed and or withdrawn; that the surveying exercise the applicant relies on was not authorised by her late father; that she and her late brother instructed a surveyor vide letter dated 26th September 1989 who subdivided the land left by their father into eight plots.
3. The record confirms that the directions was taken on the 21st October 2015 for the application to be heard through oral evidence. During the hearing Ali Mselem Ali, the applicant, and Rehema Badi Ali, the respondent, testified as PW1 and DW1 respectively.
4. PW1 testified that he bought half acre of land parcel MN/11/114 from Badi Ali Hafidh, late father to the respondent, in 1978 at Kshs.8000, in the presence of the Senior Chief, and vendor's son. That the vendor took him to a surveyor who charged him Kshs.3000, to excise the half-acre portion, which he paid in instalments. The surveyor did the survey and came up with the deed plan. That he took possession of the half-acre and established his home there in 1980, and lived there peacefully, with the vendor as his neighbour. Then in 1988, he moved to Bungoma but kept on visiting the property on two-month intervals. In the 1990's he learnt the respondent and her brother had moved onto their late father's land after his death. That the respondent and her brother passed on in 1990's, were claiming he was on the land as a caretaker. That he engaged the respondent and her brother and informed them he had bought the half acre. He then reported to the Public Trustee, who summoned the respondent and her brother. That after the two confirmed that applicant had bought the half acre from their father, The Public Trustee asked them to go to an advocate and record an agreement, which they did. They also did a transfer before another advocate. Thereafter, the respondent's brother passed on, and when the applicant presented the transfer to Lands office for registration, he was asked to tell the respondent to surrender the mother title. That the respondent initially promised to do so, but later declined and asked him to pay for the land afresh at Kshs.400,000. That he came to court after some people encroached onto his portion and when he resisted, those people threatened to beat him. During cross examination, PW1 stated that the previous suits were over encroachment onto his land. That the survey of his land was done, and completed during the lifetime of the vendor.
5. DW1 testified that she was about ten years, and her late brother about thirteen year old in 1978 when the applicant alleged to have bought half acre land from their father, who died in 1985, and did not know of it. That she is not aware whether the applicant had surveyed and fenced the half acre portion. That after the death of their father in 1985, they saw the sale agreement between him and the applicant, and they approached him to discuss the matter but he declined. That her father had sold portions of land parcel MN/11/114 to some people, and had transferred those parcels to them, leaving plot MN/11/1012 in his name, that was transferred to her name and that of her brother on 27th March 1992. She denied that her brother, who died in 20th September 1991, and herself had signed the transfer



document dated the 22nd May 1991. During cross examination, Dw1 stated that when she saw the sale documents after the death of their father, her brother confirmed remembering signing the sale agreement between the applicant and their late father. That when they approached the applicant for further details, he was not cooperative. She confirmed that the applicant took possession in 1985, and has built over ten houses on the half acre portion of land, and collects rent from the tenants occupying them. That they were aware that applicant had bought a half acre portion when she and her brother transferred MN/11/1012 to their names in 1992. That they had instructed a surveyor to subdivide that land in 1991 for themselves, and not for the applicant.

6. The learned counsel for the applicant and respondent filed their submissions dated the 12th April 2024 and 24th May 2024 respectively, which the court has considered.
7. The following are the issues for the court's determinations:
 - a. Whether the sale agreement dated 3rd November 1978 was valid and enforceable.
 - b. Whether the applicant is entitled to ownership of half acre of MN/11/1012.
 - c. Who pays the costs?
8. The court has carefully considered the pleadings by applicant, affidavit, oral and documentary evidence by the parties, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings:
 - a. The applicant's claim of MN/11/2754, which a subdivision from MN/11/1012, that was itself a subdivision of MN/11/114, is undoubtedly based on the sale agreement of 3rd November 1978 between himself and the late Badi Ali Sanifu. That has been confirmed by PW1 in his oral and documentary evidence availed, that included a copies of the sale agreement duly signed by himself as purchaser, the late Badi as vendor, and witnessed by the late Hafidh, then aged about thirteen years old, who was the son to the vendor and brother to the respondent. The learned counsel for the respondent has submitted among others that the said sale agreement was not valid, as Hafidh was then a minor, and was not available to testify as he had passed on. DW1 testified that after the death of their father in 1985, her mother, Hafidh and herself, got a copy of a sale agreement between the late Badi and the applicant, that had her brother, Hafidh, as a witness. That after Hafidh told them he could remember witnessing the sale agreement, they went to the applicant with a view of getting further details, but he was uncooperative. That while it is true the sale agreement of 3rd November 1978 may not have complied fully with the requirements of section 3(3) of the *Law of Contract Act* chapter 23 of Laws of Kenya, on witnessing and attestation, the applicant's evidence that he took possession in 1978, fenced and erected rental houses thereon, and was still in possession by the time Badi, the vendor died in 1985, leads to the court to the conclusion that they treated the sale as completed and sealed. The late Badi was all along the neighbour to the applicant, and there is no suggestion that he ever complained about the applicant's possession and use of the land.
 - b. That the applicant has testified that it is the late Badi who took and introduced him to the surveyor, to survey the half-acre from MN/11/1012, and his portion was excised as MN/11/2754, Deed Plan 141469, measuring 0.2035hectares. It appears the parcel was however not registered and or transferred to the applicant's name and the respondent as administrator of the deceased's estate, declined to effect the transfer, instead demanding the applicant pay Kshs.40,000 for it, which the applicant declined to pay. The applicant has also referred to the subsequent agreements and transfer made between him, respondent and her late brother, which have however been disputed by the respondent. What I gather from the totality



of the evidence tendered by the two parties herein is that the respondent and her brother were not really questioning the validity of the sale agreement of 3rd November 1978, but wanted to be paid additional monies for them to effect the transfer. It is surprising that the respondent claimed the signatures on the subsequent sale agreement and transfer documents, were not affixed by her late brother, and or herself yet none has ever lodged a formal complaint with the police for investigations and action. I therefore conclude that the issue of questioning the validity of the sale agreement of 3rd November 1978 was an afterthought, calculated to make the applicant pay afresh for the land he had bought and paid for during the lifetime of the late Badi.

- c. Originating summons applications are provided for, under Order 37 of the Civil Procedure Rules. Rule 3 thereof provides for summons by vendor or purchaser of land “for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).” The summons by the applicant does not question the existence or validity of the sale agreement between him and the late Badi. It seeks for the respondent “to complete the transaction relating to land subdivision Number MN/11/2754” and for “an order that the transfer of plot number MN/11/2754” in the event the respondent failing to do so. I find the application is therefore properly before the court.
 - d. That while it is evident that the applicant has had other litigations over the suit property, it is clear they were relating to trespass and citation proceedings, and none of those matters has decided on merit the issues raised herein. Now that this suit has been heard viva voce, and in view of the foregoing determinations, and noting the objections by the respondent’s relating to the applicant’s entitlement to the suit property is without basis, the court has the responsibility to issue orders that will bring the conflict to a just end.
 - e. That under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, costs follow the events, unless where the court for good cause orders otherwise, I find in this matter, each party bears their own costs. This will help the parties, who are neighbours, to foster better relations going forward.
9. Flowing from the above determinations, the court finds and orders as follows:
- a. That a declaration is hereby issued that the applicant bought half-acre portion of land out of MN/11/114 from the late Badi Ali Sanifu.
 - b. That MN/11/114 was later subdivided into MN/11/1012 that comprises of the Applicant’s half-acre and other parcels.
 - c. That the Applicant’s half-acre portion was later subdivided from MN/11/1012 as MN/11/2754.
 - d. That the respondent herein, being the administrator of the estate of the late Badi Ali Sanifu, is hereby directed to execute all the necessary documents to transfer the half-acre portion, being MN/11/2754, to the applicant within the next sixty (60) days, and in default the Deputy Registrar of this court to execute all the necessary documents to give effect to this order.
 - e. That the applicant will meet all the relevant statutory fees to give effect to the transfer.
 - f. Each party to bear their own costs.

Orders accordingly.



DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF SEPTEMBER 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of:

Applicant : Mr. Olwande

Respondent : No Appearance.

Court Assistant: Leakey

S. M. Kibunja, J.

ELC MOMBASA.

