



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**SUCCESSION CAUSE NO. 161 OF 2016**

**IN THE MATTER OF THE ESTATE OF DONATO SCIACOVELLI (DECEASED)**

**GLADYS NASERIAN KAIYONI.....PETITIONER**

**AND**

**SVETLANA ISKOROSTINSKAYA**

**SUSANNA SCIACOVELLI.....OBJECTORS/APPLICANTS**

**Coram: Hon. Justice R. Nyakundi**

**Gaka Barongo Advocate for the applicant**

**Obinju Rondo Advocate for the respondents**

**RULING**

This is a notice of motion dated 9.9.2020 by **Gladys Naserian Kaiyoni** expressed to be brought under Section 1, 1A, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and Section 45, 47, 71, 76, 86 and 94 of the Succession Act, Rule 44 (1), 59(6) of the Probate and Administration Rules seeking the following orders:

- (a). That this Honourable Court be pleased to revoke and 1 or annul the confirmation of grant issued on 8.7.2020 to the petitioners herein and a fresh certificate be issued.***
- (b). That this Honourable Court be pleased to cancel any titles that might have been issued with respect to the parcel of land registered as LR No. 13402 No.1932 with effect from 8.7.2020.***
- (c). That the Court makes a declaration to remove LR No. 13402 original No. 1932 from the general estate of the deceased.***
- (d). That the parcel of land was under joint tenancy between the deceased and the applicant herein and devolved under survivorship thus to be removed from the general estate of the deceased abinitio.***

The application is predicated on the supporting affidavit of the applicant, **Gladys Naserian** which she avers and reiterates that the parcel of land in question was a joint tenancy between her and the deceased. That by virtue of the confirmed grant her respective share in No. 13402 (Original No. 1932 was erroneously included in the certificate of confirmation of grant as part of the deceased's estate. The respondents have put in a defence to the notice of motion by way of the filed grounds of opposition

couched in the following language.

***That the certificate of confirmation of grant dated 8.7.2020 lawfully entitled the beneficiaries the deceased half share in respect of the subject suit land. That the instrument of sale and transfer relied upon by the applicant being the indenture dated 13.7.2015 and sale agreement dated 9.7.2015 neither sets out the applicant's ownership as a joint tenancy or tenancy in common.***

That the relevant applicable Law that govern the alleged claim by the applicant is the provisions under Section 91 (2) of the Land Registration Act 2012. That, given those facts, the applicants purported claim for joint tenancy in the said parcel of land is based upon a Law which has since been repealed.

## **Background**

This indeed has been a protracted succession cause litigation between the respondents and the applicants. The cause was relating to the estate of the deceased **Sciacovelli Donato** initially thought to have died testate but in subsequent proceedings the purported will made by the deceased was found to be a forgery, false and fraudulent.

According to the Court Ruling dated 7.2.2019 the Will was declared invalid and the deceased estate was to be administered intestate in respect of his properties in Kenya.

In the meantime, the applicant **Gladys Naserian** holding unto that forged Will had already withdrawn from the Bank accounts of the deceased a sum of Kshs.15,800,000/=.

At the conclusion of the trial, it was ordered by the Court that such monies withdrawn illegally without a valid instrument from the Estate of the deceased be paid back to the estate for distribution by whoever will be appointed to administer the said estate.

In adherence to the decisions of the Court, on 20.6.2020 a certificate of confirmation of grant was issued to **Svetlana Iskorostinskaya** on 8.7.2020 to administer the Estate of the deceased **Donato Sciacovelli** for the benefit of the beneficiaries namely **Susanna Sciacovelli** and **Ederson Sciacovelli**.

At the heart of this new application is the purported joint tenancy ownership of plot number 13402 delineated and reserved in the survey plan 315934 (half share the respondents take the position that in terms of Section 91(2) of the Land Registration Act there is no illegality that would entitle the Court to revoke the confirmed grant of administration to the estate of the deceased.

The application was canvassed before me by way of written submissions by **Mr. Barongo** for the applicant and **Mr. Obinju** for the respondents.

## **Determination**

Looking at this application from that perspective, I first ask the question whether the applicant has shown a prima facie case for this Court to revoke or annul the confirmed certificate of grant issued to the administrators herein under Section 76 of the Law of Succession.

That issue successfully, understood, the applicant case states that she has legal right of ownership which she calls joint tenancy in respect of **LR Parcel No. 13402 Malindi**.

My first task is therefore to establish the crucial strand in the tenure tapestry for the protection of her right to that parcel of land. The issue in respect of the same statutory provisions under Section 91(1) of the Land Registration Act 2012 was addressed by the Court in **Isabel Chelangat v Samwel Tiro Rotich & 5 others {2012} eKLR**:

***“At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to***

*simultaneous enjoyment of land. To expound on this point I have borrowed heavily from two texts. Megary & Ward, The Law of Real Property and Cleshire & Burn's, Modern Law of Real Property. According to Burn, "... a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares ...." Further, that "there is a thorough and intimate union between joint tenants. Together, they form one person. A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and "four unities". The right of survivorship (just accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are*

*(i). The unity of possession.*

*(ii). The unity of interest.*

*(iii). The unity of title.*

*(iv). The unity of time.*

*On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. if he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of Law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time. Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential. A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain."*

In essence from the outset tenancy in common is different from joint tenancy. In the instant application the only instrument produced by the applicant to the Court is a sale agreement marked GN1 dated 9.9.2020 and the indenture made on 13.7.2015. It is clear from the indenture that the terms of either a joint tenancy or tenancy in common are not clearly outlined in the deed, Title or other legally binding property ownership document.

The applicant advances a trajectory of joint tenancy to give rise to the right of survivorship, whereby upon the death of a joint-tenant, the entire estate goes to the survivor. That is the cannon the applicant lays claim over the suit property.

In the present case, the deed founding the rights to the parcel of land in question was concluded on 13.7.2015 without the addendum clause of the deed or conveying instrument exhibiting the clear intent of the parties, to be either joint tenancy or tenants in common.

So in the transfer annexed by the applicant, a transfer to X and Y or to the survivor of them or some other similar language is required by the Court in order to establish the creation of a joint tenancy with the deceased. For present purposes, the preconditions to demonstrate the existing rights of a joint tenancy in relation to each is ambiguous. Therefore, in my view if the deed or other conveying instruments which lays out the legitimate expectations of the tenants names two or more individuals as grantees and contains no language specifying how the beneficiaries share the interest, a tenancy in common results.

The doctrine of common tenancy is perhaps of greatest significant when considered in the context of the definition by **William Blackstone, Commentaries on the Laws of England 179, B, Adams Ed 1983 1785:**

***“Simply put tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession. As a result of these several separate interests, and unlike the joint tenancy, there is no right of survivorship between or among tenants in common when one tenant in common dies, his or her interest is administered as part of his or her estate and will either devise by Will or descend by the Laws of intestacy.”***

The interesting feature of this Succession Cause is that fact that the applicant vigorously pursued to be recognized as a wife of the deceased, but it was found to be a non-suited issue followed with a dismissal.

The decision was based on the definition of marriage as characterized in our system of marriage recognized as promulgated by parliament in the statutes. Although the applicant’s right to marriage failed, I find tenancy in common did exist with regard to **LR 13402** that entitled each one half interest in the estate. Such an interest does not attach to the survivorship interest that would create an interest in the heirs of the survivor under Section 29 of the Law of Succession.

The application of this principle to the instant case leads me to a broad statutory interpretation that the common tenancy was destroyed and severed upon the death of the deceased (**Donato Sciacovelli**).

The applicant has made out a prima facie case as co-owner of parcel number 13402 at Malindi. She has presented the indenture issued the Land Act of 2012, and Registration of Titles Act (282). Strictly, speaking the deceased’s interest in the property shall pass to his estate. The implication is that one of the combined residue of the property is permitted physically to be enjoyed by the applicant and those rights held during the survivorship of the deceased terminated with his death. The applicant has a right to alienate her interest and beneficial rights in the tenancy in common.

The general principles that should apply in the determination of this application is whether the Court should grant order for revocation of grant of letters of administration dated 8.7.2020.

There are clear statutory provisions under Section 76 of the Law of Succession to guide the Court the discretion to decline or grant the application. Here evidence on the documents she has produced indicate that she is a co-owner of the property captured as part of the estate in the confirmed grant of this Court.

It is not in dispute that in this application, the claim for revocation of grant is based on the question of ownership in the interest of the parcel of land which was yet to be divided among the co-tenants. As a tenancy held between the applicant and the deceased each had an equal right of possession over the entire property, but no right of survivorship. The fact that the respondents did not disclose to the Court during confirmation hearings the said application squarely falls within the scope of Section 76 (1) of the Law of Succession. In the circumstances, therefore, the Law required of the respondents to obtain the consent of the applicant while making the application for confirmation of grant thereof to the estate of the deceased.

I find that the proceedings to obtain the said confirmed grant were defective in substance upon the respondents having failed to disclose that the applicant had respective right half share to title to the estate property in LR 13402 {1932}. That fatal defect in procedure notwithstanding confirmation was obtained fraudulently by concealment of a material factor.

In sum under Section 76 (1) of the Law of Succession, the confirmed grant need not be revoked but it must be set aside to consider the applicant's appropriate entitlement in the estate in issue. Another issue of curiosity to note is that according to the record the applicant interfered and intermeddled with the estate of the deceased without any grant of representation made to her by the Court.

For present purposes however, it is the role of the Court to intervene and deal with the illegality and unlawfulness of her conduct in considering the grounds in exercising discretion to protect and preserve the estate of the deceased. These cases are of central importance. In **Re Estate of John Gakunga Njoroge {2015} eKLR Murithi J** held:

***“A person can only deal with the estate of a deceased person pursuant to a grant of representation made to him under the Law of Succession Act. In this regard the jurisdiction of the Court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act.”***

For the transactions by the applicant as against the beneficiaries of the estate of the deceased entered into before the grant of letters of administration and before the confirmed grant, the contracts of sale are invalid for offending the provisions of Section 45 and 82 of the Law of Succession Act. To these facts the Court in **Morris Mwiti Mburugu v Dennis Kimathi M. Mburugu {2016} eKLR** had this to say:

***“Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of Section 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the Court.”***

The facts of the case on intermeddling with the Estate of the deceased by the applicant have been stated elsewhere by the Court and will not therefore be repeated here. However, it will be remembered in that case the applicant without any color of right conveniently manipulated the evidence that the deceased estate was probate testate upon which the Court exercised discretion on 29.8.2016 to release a sum of Kshs.15,800,000, innocently under the pretext that the applicant was a holder of a valid Will.

Thereafter, the actual outcome in the Succession Cause is particularly important. It concerned a challenge to the decision of the Court whereby the applicant was permitted to act as executor of a non-existence Will to administer the estate of the deceased. In that Judgment of **Korir J.** on 7.2.2019. the purported Will was found to be a forgery and *void abnatio*.

The respondent/applicant was ordered and directed to indemnify the estate of the deceased, in the sum of Kshs.15,800,000/= it is evident from subsequent proceedings that the applicant is yet to comply with the declarations in the Judgment of the Court with regard to repaying back the Estate money she defrauded the beneficiaries.

For purpose of achieving equity in the confirmation hearing in the distribution of an intestate estate of the deceased, with regard to the contested share in the immovable property, in consideration of other receivables and assets by the applicant albeit irregularly must be taken into account.

It is not disputed that the applicant herself has been guilty of dishonest or of unequitable conduct which can be described as coming to the Probate Court with unclean hands. As also admitted in Law, the Probate Court will not be a participant in the injustice that will leave the respondents without a remedy.

To this extent, I would allow the notice of motion dated 9.9.2020 with the following binder orders:

***(1). The certificate of confirmation of grant issued to the respondents on 8.7.2020 be set aside for the terms of the equal share benefits entitlement to the applicant be distributed and severed from the tenancy in common provided in LR Parcel No. 13402 original number 1922 Malindi.***

***(2). The prior Ruling of the Court to give inking to the scheme of distribution contained the sum of money in Kshs.15,800,000/= acquired and illegally appropriated by the applicant.***

***(3). In light of the foregoing, it is safe to conclude that the half-share upon severance shall not be conveyed to the applicant without first making good the repayment of the ascertained liquidated amount withdrawn from the bank accounts in Equity and Barclays held in the name of the deceased.***

***(4). Moreover, it would amount to inequity of shares not founded on any of the provisions in the Law of Succession on distribution of intestate estate. Without a valid Will the applicant had no right to intermeddle and dissipate the estate of the deceased. Each party shall bear their own costs with leave to appeal within twenty-eight days from today's order.***

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>th</sup> DAY OF FEBRUARY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

***NB: This Ruling has been emailed to the advocates pursuant to the causelist of 26.2.2021.***

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