



Wairimu v Mugumo Nyankinyua Kiambaa Co. Ltd & 2 others (Environment and Land Appeal E025 of 2024) [2025] KEELC 1435 (KLR) (18 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E025 OF 2024
JM ONYANGO, J
MARCH 18, 2025**

BETWEEN

SUSAN WAIRIMU APPELLANT

AND

MUGUMO NYANKINYUA KIAMBAA CO. LTD 1ST RESPONDENT

STEPHEN KARANJA KIBUNYI 2ND RESPONDENT

DENNIS GICHERU 3RD RESPONDENT

JUDGMENT

1. This appeal was triggered by the judgment of Hon. M. Sudi Principal Magistrate in Kiambu CMELC Case No. E009 of 2021 delivered on 26th February 2024 in which he dismissed the Appellant’s case.
2. A brief background of the case is necessary in order to put the matter into perspective. The Appellant and 3rd Respondents are brother and sister. Their late mother, Grace Gicheru bequeathed them a plot measuring 0.056 or approximately $\frac{1}{4}$ of an acre which she had purchased from Mugumo Nyankinyua Kiambaa Company Limited (1st Respondent). However, at the time of her demise a title deed had not been issued and the Certificate issued by the 1st Respondent was in the joint names of the Appellant and the 3rd Respondent.
3. Sometime in 2019, the 3rd Respondent sold what he considered to be his share in the suit property to the 2nd Respondent without the Appellant’s consent. Upon learning of the sale, the Appellant instituted a case in the lower court vide Originating Summons seeking cancellation of the contract of sale between the 2nd and 3rd Respondents on the grounds that it had been done without her consent and that the suit property was not divisible and sharable with a stranger owing to access challenges.
4. The 3rd Respondent filed a Replying Affidavit in which he denied the Appellant’s claim and stated that on 27th August 2014, the 1st Respondent allocated the 3rd Respondent his plot no. 1030A while



the Appellant was allocated plot no. 1030B and each of them was given a certificate for their respective plot. He further stated that the dispute that the Appellant had with the 3rd Respondent had nothing to do with his plot no. 1030A.

5. The 2nd and 3rd Respondents also filed a Defence in which they reiterated the contents of the 3rd Respondent's Replying Affidavit. He claimed that the Appellant's claim was driven by malice with view to frustrating the 3rd and 2nd Respondents' investment in a joint venture.
6. After considering the evidence adduced by the parties, the trial magistrate delivered her judgment in which she held that the sale between the 2nd and 3rd Respondents was valid and that the 2nd defendant was a bona fide purchaser for value without notice.
7. Being aggrieved by the said judgment, the Appellant filed the instant appeal citing the following grounds:
 1. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's Originating Summons.
 2. That the learned trial magistrate erred both in law and in fact in failing to appreciate the circumstantial, factual and legal posits by the Appellant in her submissions.
8. The appeal was canvassed by way of written submissions and both parties filed their submissions together their lists of authorities.

Appellant's Submissions

9. In his submissions, learned counsel for the Appellant contended that the 3rd Respondent sold the suit property to the 2nd Respondent without following the proper procedure. He placed reliance on the case of *Nyambura Karori v John Githere Karanja & 2 Others* (2018 eKLR where the court held that land that is jointly owned cannot be sold without the consent of the co-owner. He also relied on the case of *Samuel Uiru v George Mburu* (2020) eKLR where the court set out the procedure for severance of a common tenancy by way of partition. One of the ways in which this can be done is provided under section 94 of the *Land Registration Act* which states 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 Land registrar for the the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying or requiring consent to a sub-division of land and 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 the all the tenants or
 - (b) any person in whose favour an order has been made for the sale or an undivided share in land in execution of a decree.
10. Further, in the case of *Muhuri Muchiri v Hannah Nyamunyu* (sued as Administrator of the estate of Njenga Muchiri also known as Samuel Njenga Muchirii (Deceased) (2015) eKLR the court held that :

“Co-owners by agreement to sever the co-ownership by acquiring the interests of another co-owner and thus become solely entitled or by sale of the common property and division of the proceeds”.



...It is also provided in Halsbury's Laws of England, Fourth Edition (Reissue) Volume 39 (2) at paragraph 214-215 as follows in this regard;

“ 214. Determination of union of interests in one person.....A tenancy in common may be determined by the union of various interests , whether by acquisition inter vivos or by testamentary disposition in the same person who therefore hold the entirety of the land.

215. Determination by partition. A tenancy in common may be determined by partition. The legal term partition is applied to the division of land , tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them”

Under section 96 of the [Land Registration Act](#), if for any reason the land sought to be partitioned is incapable of being partitioned or the partition would adversely affect the proper use of the land , and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common agree on the terms and conditions of the sale or the application of the proceeds of sale, the tenants in common may make an application to the court for an order for sale and the court may:

- a. Cause a valuation of the land and of the shares of tenants in common to be undertaken; and
- b. Order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or
- c. Make any other order to dispose of the application which the court considers fair and reasonable”

11. Counsel further relied on the case of *NNK v JNR (2020) eKLR* where the court restrained the defendant from disposing of the suit property which was jointly owned without the Plaintiff's consent.
12. In his Supplementary submissions dated 3.2.25 counsel submitted that the 3rd Respondent violated the principle of *Nemo dat quod non habet* by purporting to sell the suit property without a title. He relied on the case of *Lole v Butcher (1949) AER 107* and *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim (2019) eKLR*
13. He submitted that the 2nd defendant failed to conduct proper due diligence and he could therefore not claim to be a bona fide purchaser for value without notice. He reiterated that the suit property could not be sold without the Appellant's consent. He relied on the case of *Machage v Samuel Ngigi Karuri (Sued in his capacity as the 1st Defendant and as the legal representative of the estate of Wariara Ngigi (Deceased) Environment and Land Civil Suit No. 43B of 2016) [2022] KEELC 3396 KLR 25 May 2022* for the proposition that in a joint tenancy a co-owner cannot be excluded from any transaction to sell the property.
14. It was counsel's contention that an undivided share cannot be transferred as property that is owned in common can only be partitioned with the consent of the co-owner or by an order of the court



Respondent's Submissions

15. In her submissions dated 9.12.2024 learned counsel for the 2nd and 3rd Respondent submitted that in determining whether or not to set aside the lower court's judgment, this court must be guided by the principle laid down in the case of Kenya Ports Authority v Kuston (Kenya) Limited 2009 2EA 212 cited in the case of Muruka (suing as the Administratrix of the estate of Amondi Chwala –Deceased v Awange Environment and Land Appeal E024 of 2022) [2024] KEELC 1516 (KLR) 21 March 2024) where it was held that an appellate court should not be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the trial court was clearly wrong because of misdirection or failure to take into consideration some relevant matter.
16. Counsel submitted that the suit property was held under a tenancy in common. She relied on the case of Moses Bii v Kericho District Land Registrar & Another where the court was of the view that where the register does not indicate whether land is held jointly or in common, it should be presumed that the land is held in common. She buttressed her argument with section 91(8) of the *Land Registration Act* which provides that since the enactment of the said Act, joint tenancies could only be created between spouses.
17. Counsel acknowledged that a tenancy in common could only be severed with the consent of the co-owner in accordance with the provisions of section 94 of the *Land Registration Act*. She was of the view that the Appellant had neglected to take up the offer of selling her portion to the 3rd Respondent and he therefore went ahead and sold his share to the 2nd Respondent.
18. She further submitted that the Appellant has no locus standi to seek the revocation or cancellation of the sale agreement between the 2nd and 3rd Respondents as she was not party to the said agreement. She relied on the cases of Agolla & Another v Manager Housing Finance Cooperation Kisumu Branch Miscellaneous Civil case No. E157A of 2021 [2022]KEHC 10215 KLR and Agricultural Finance Corporation V Lendetia Limited for the proposition that only those who are party to a contract can benefit from it.
19. It was counsel's submission that the 3rd Respondent had informed the Appellant of his intention to sell his share of the suit and he offered her the first priority but she refused. It was only after refusal that he offered to sell it the 2nd Respondent.
20. She submitted that the Appellant had failed to demonstrate that the suit property was indivisible yet the 3rd Respondent had produced a surveyor's report showing that the suit property was divisible.
21. Counsel submitted that the 2nd Respondent was a bona fide purchaser for value without notice. She relied on the case of Lawrence Mukiri v Attorney General & 4 Others (2013) eKLR where the court held that

“ a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly’.
22. It was counsel's contention that having received the full purchase price and put the 2nd Respondent in possession, the 3rd Respondent, a constructive trust was created between the 2nd and 3rd Respondents in accordance with the decision of Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR. which was cited in the case of Zachary Warwimbo Ruhangi v Clement Muturi Kigano (2017) eKLR. She therefore urged the court to dismiss the appeal.



23. As a first appellate court, my jurisdiction is to conduct a careful reappraisal of the evidence and issues presented before the trial court, to sift through the record with a discerning eye, and to reach my own considered conclusions. Yet, my role is circumscribed; it is not my place to embark upon fresh inquiries, venture beyond the record or to entertain matters that were neither raised nor contemplated in the trial court.
24. To do otherwise would be to stray beyond my remit, undermine the integrity of the appellate process and trespass into territory that rightly belongs to the trial court's own fact-finding function. See the Court of Appeal's decision in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR where the court reiterated its mandate as espoused in *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 where it stated:
- “On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

Analysis and Determination

25. Having considered the entire Record of Appeal, the Memorandum of Appeal and parties submissions together with the authorities and the relevant provisions of the law I am of the considered view that the following issues fall for determination:
- i. Whether the suit property is held under joint or common tenancy
 - ii. Whether the 3rd Respondent was entitled to dispose of half of the suit property without the Appellant's consent.
 - iii. Whether the judgment of trial court should be set aside.
26. It is not in dispute that the suit property was bequeathed to the Appellant and Respondent by their late mother as a gift inter vivos. At the time of her demise, she had not been issued with a title deed but she had a certificate of ownership issued by the 1st Defendant which bears the joint names of the Appellant and the Respondent and they are therefore co-owners. In order to determine whether the Appellant and 3rd Respondent should be considered as joint owners or tenants in common it is important to examine the relevant legal frameworks.
27. According to Halsbury Law of England Fifth Edition, 2012 Volume 87, where land is granted to two or more persons for the same estate and where there are no words in the title document indicating that the registered owners hold separate interests, then that parcel of land is held as a joint tenancy.
28. Four main features mark this type of ownership: (1) the joint tenants own an individual interest in the property as a whole; each share is equal, and no one joint tenant can ever have a larger share. (2) the estates of the joint tenants are vested (meaning fixed and unalterable by any condition) for exactly the same period of time in this case, the tenant's lifetime. (3) the joint tenants hold their property under the same title. (4) the joint tenants all enjoy the same rights until one of them dies. Under the right of survivorship, the death of one joint tenant automatically transfers the remainder of the property in equal parts to the survivors (*jus accrescendi*). When only one tenant is left alive, he or she receives the entire estate. If the joint tenants mutually agree to sell the property, they must equally divide the proceeds of the sale.



29. Halsbury Law of England Fifth Edition, 2012 Volume 87, page 162 states that the nature of joint tenants is that each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act. The interest of each is the same in extent, nature and duration.
30. Several features distinguish a joint tenancy from a tenancy in common. A tenant in common may have a larger share of property than the other tenants. The tenant is also free to dispose of his or her share without the restrictive conditions placed on a joint tenancy. In a tenancy in common, no other tenant in common is entitled to receive a share of the property upon a tenant in common's death; instead, the property goes to the deceased's heirs.
31. Section 91(1) of the *Land Registration Act* provides as follows:-
- “In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.”
32. In considering whether the co-tenancy among the tenants herein was a joint tenancy or tenancy in common, the court is guided by section 91 (8) of the *Land Registration Act* which provides as follows:-
- “On and after the effective date, except with leave of a court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common.”
33. The initial certificate in respect of Land Reference No.1030 issued by the 1st Respondent is in the names of the Appellant and 3rd Respondent without indicating their respective shares. Based on the above provisions of section 91(8), it is safe to conclude that the form of tenancy that exists between the Applicant and the 3rd Respondent is a tenancy in common.
34. With regards to disposition of land that is owned in common, subsections 5 and 6 provide as follows:
- (5) If any land lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.
- (6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common except with the consent in writing of the remaining tenants but such consent shall not be unreasonably withheld.
35. This therefore means that the suit property could only be disposed of in accordance with section 91(6) of the *Land Registration Act* which requires that the consent in writing of the co-owner be obtained. In the case of *NNK v JNR (2020) eKLR* the court held as follows:
- “From the above provisions of the law it means that if land is co-owned, one co-owner cannot deal with the suit property without the consent of the other as no one co-owner has a better right than the other. The Plaintiff has alleged that the Defendant did sell part of the suit property without consulting her. That is contrary to what is expected of the co-owner. Therefore, the court finds that the Defendant has no right to deal with the suit property which is co-owned with the plaintiff without her consent. The court further finds and holds that no one co-owner has a superior right to the other. Further the law requires that if the defendant needed to deal with the land, he ought to have sought the consent of the plaintiff before he could have any dealings with the suit land. However, such consent should not be unnecessarily withheld but the same must be sought.



It is not in doubt that the defendant disposed of part of the suit property without the consent of the plaintiff and consequently the court finds that the plaintiff is entitled to the orders sought in the Plaintiff's Complaint.

36. Further in the case of *Machage v Samuel Ngigi Karuri* (2022) eKLR ELC 3391 (KLR) the court held that the agreement entered into by the 1st Defendant without the 2nd Defendant who was a co-owner of the suit property was invalid.
37. In the instant case, even though the 3rd Respondent stated that he had consulted the Appellant before he sold a portion of the suit property, it is clear that he did not obtain her consent as required by the law. Nevertheless, he went ahead and partitioned the land after which he sold what he considered to be his share to the 2nd Respondent. In his evidence the 3rd Respondent admitted that he did not inform the Appellant about the survey nor did he inform her that he was going to the 1st Respondent's office to have the land divided into two portions so that two certificates could be issued. What the 3rd Respondent ought to have done when the Appellant declined to purchase his share was to apply to court for partition or sale of the suit property.
38. From the evidence on record it is clear that the 3rd Respondent sold a portion of the suit property to the 2nd Respondent contrary to the provisions of section 91(6) of the *Land Registration Act* and it is therefore my finding that the said sale is null and void.
39. In my considered opinion, the trial magistrate correctly made the finding that the Applicant and 3rd Respondent were tenants in common but fell into error when she failed to reach the conclusion that the sale was invalid.
40. As a co-owner of the suit property, the Appellant has a right to challenge the sale of a portion of the suit property to the 2nd Respondent without her consent. By so doing, she does not seek to benefit from the contract between the 2nd and 3rd Respondents and therefore the argument that she has no privity of contract does not arise.
50. As to whether the 2nd Respondent should be considered as a bona fide purchaser for value without notice, the evidence on record shows that he was aware that the suit property was registered in the joint names of the Appellant and the 3rd Respondent but he nevertheless entered into a sale agreement with the 3rd Respondent without involving the Appellant. It is therefore my finding that he is not a bona fide purchaser for value without notice.
51. In view of the foregoing, the appeal has merit. I must however point out that the prayer seeking to direct the 3rd Respondent to sell his share to the Appellant or vice versa is not tenable as the court cannot force parties to sell their property to a particular person.
52. Accordingly, the appeal succeeds in part and I make the following final orders:
 - a. The appeal is allowed in part and the judgment delivered on 26th February 2024 in Kiambu CM ELC No. 9 of 2021 is hereby set aside and substituted with the following orders;
 - b. An order is hereby issued directing the Mugumo Nyakinyua Kiambaa Company Limited to process the title deed in respect of plot no. 1030 in the names of the Appellant and the 3rd Respondent.
 - c. The sale agreement between the 2nd and 3rd Respondents is hereby declared null and void as the same was not obtained with the consent of the Appellant. The said agreement is hereby cancelled.



d. As the main dispute herein involves siblings, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF MARCH 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Mr Ojienda for the Appellant

Miss Wangui for the 2nd and 3rd Respondents

Court Assistant: Hinga

