



**Schellekens & 2 others v Putte (Environment & Land Case 23A of 2020)
[2023] KEELC 20134 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 23A OF 2020
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

MARINA SCHELLEKENS 1ST PLAINTIFF

MICHEL VAN DEN PUTTE 2ND PLAINTIFF

SAARTJE VAN DEN PUTTE 3RD PLAINTIFF

AND

LUC VAN DEN PUTTE DEFENDANT

JUDGMENT

1. The Plaintiffs' case is that the Plaintiffs and the Defendant were and remain the legitimate registered proprietors as tenants in common of all that Parcel Reference Subdivision No. 2107 (Original No. 1669/1) of Section I Mainland North, situated in the Mombasa Municipality. The Plaintiffs and the Defendant jointly purchased and developed property Reference Subdivision Number 2107 (Original No. 1669/1) Section I, Mainland North, Mombasa. The suit property was jointly purchased by all parties herein in the year 2011 at a consideration of Kshs. 19, 000, 000 .00. The 1st Plaintiff and the Defendant were legally married, which union was blessed with two (2) issues the 2nd and 3rd Plaintiffs. The union between the 1st Plaintiff and the Defendant was formally extinguished *vide* divorce proceedings conducted in the Kingdom of Belgium with effect from August, 2017. The Plaintiffs state that immediately after the 1st Plaintiff relocated to the Kingdom of Belgium, the Defendant informally and unprocedurally rendered a change of user to the suit property. commenced letting out the suit property for commercial gain and commenced frustrating their efforts at accessing the suit property.
2. The Plaintiffs' claim against the Defendant is therefore for:
 1. Declaration that the Plaintiffs and the Defendant are the legitimate registered proprietors as tenants in common of all that Parcel Reference Subdivision No. 2107 (Original No.



1669/1) of Section I Mainland North, situated in the Mombasa Municipality, containing by measurement Nought Dec Two Three Seven Seven (O .2377) of a Hectare or thereabouts, and all developments thereon (the "Suit Property")

2. A declaration that the Defendant's occupation, enjoyment and derivative use of the suit property with effect from Year 2015 has therefore been in trust for all tenants in common thereof.
 3. A permanent injunction do issue restraining the Defendant, whether by himself, his agents/ servants/ employees/assigns or whosoever claiming through him, from wasting, disposing of the suit property, interfering with the Plaintiffs' possession, occupation, enjoyment and derivative use of the suit property, and/or in any manner whatsoever, dealing with the suit property in a manner adverse to the Plaintiffs' Interest therein;
 4. An order do issue directing the Defendant to render accounts within seven (7) days of said order in respect of all funds collected by himself in respect of the commercial usage of the Suit Property with effect from March, 2015 to the date of said Order, in default whereof the Honourable Court be Pleased to apply the estimates and calculations submitted by the Plaintiffs in the course of these Proceedings;
 5. An order do issue directing the overt and fair valuation of the suit property within Twenty— One (21) days of such order, by a valuer appointed by the Honourable Court;
 6. An order do issue directing the forced sale of the suit property at its fair market value or thereabouts, within sixty (60) days of the valuation subject hereof which forced sale shall be conducted by the Court Bailiff and an Auctioneer appointed by the Honourable Court;
 7. An order do issue to the effect that the Proceeds of the said forced sale be applied as hereunder, in order of priority:
 8. The Court Bailiff's charges and auctioneer's reasonable fees be deducted from the total proceeds of said sale;
 9. The funds subject of prayer (d) above be reduced by and the residue deducted from the balance of the proceeds of the forced sale and apportioned equally between the Plaintiffs, with each of the Plaintiffs allocated of said amount;
 10. Balance of proceeds of the forced sale after process (i) and (ii) above be apportioned equally between the Plaintiffs and the Defendant, with each party allocated $\frac{1}{4}$ of said amount
 11. The Defendant's $\frac{1}{4}$ share of the said proceeds to be reduced by whichever amount owed by himself to the 1st Plaintiff by virtues of the divorce proceedings between the parties in Belgium and the said dues be paid out to the 1st Plaintiff directly;
 12. General damages
3. The Defendant avers that the agreement on divisions of possessions was only partially fulfilled leaving out the suit property which has never been transferred to him. Further, and without prejudice to the foregoing, the Defendant avers that the alleged licensees were placed in the property with his consent and/or permission as the property owner. The Defendant avers as follows with respect to the alleged. licensees and that they never stayed in the servant quarters as given under the purported license but instead stayed in the guesthouses where they locked themselves from the inside. They left the guesthouse with the keys to all doors together with the spares for the said keys never to return. The Defendant avers that the Plaintiffs have contrary to the division of possessions agreement, continued



to interfere with the Defendant's peaceful enjoyment of the property by constantly trespassing and harassing him with the use of Police officers at the Bamburi Tourist Police Station.

4. The Defendant avers that the Plaintiffs have failed and or refused to cede ownership of the property as agreed during the divorce proceedings. That the actions of the 1st, 2nd and 3rd Plaintiffs are a breach of agreement by failing to cede ownership of the suit property after the Defendant performed his part by surrendering ownership to all properties in Belgium. The Defendant prays: -
 1. That the Plaintiff case be dismissed
 2. That this Honourable Court be pleased to issue a declaration that Plaintiffs are in breach of the 'description and division of possessions' agreement.
 3. That this Honourable Court be pleased to issue a declaration that the suit parcel of land belongs to the Defendant solely.
 4. An order that the Plaintiffs be expunged from the entries at the land's office.
 5. A permanent injunction be issued restraining and/or barring or prohibiting the Plaintiffs whether by themselves, their servants, agents and or employees from entering, claiming and/or interfering with the Defendant's possession of the suit property.
 6. Damages for trespass.
 7. Costs of this suit.
5. This court has considered the evidence and the submissions therein. It is not in dispute that the suit property is jointly owned by the Plaintiffs and the Defendant. The issue to be determined is whether or not the Defendant held the same in trust for the Plaintiffs. The Defendant avers that there was an agreement where it was agreed that the 1st, 2nd and 3rd Plaintiffs would cede their ownership of the suit property herein in exchange for the Defendant ceding ownership of all properties and possessions in Belgium to the Plaintiffs. The Defendant further avers that the 1st Plaintiff was charged with the responsibility of delivering the above agreement on division of the property with conditions attached to a notary for purposes of notarization and effecting a deed of transfer for the properties in Belgium and here in Kenya. The Defendant avers that through an official Notarial Deed dated 3rd October 2017, he officially ceded all possessions and properties to the 1st, 2nd and 3rd Plaintiffs thereby transferring the two aforementioned properties in Belgium. This document was never produced as evidence.
6. The burden of proof laid with the Defendant to prove that there was an agreement on division of property after their divorce that he would be the sole lawful and/or beneficial owner of the suit property. He did not produce any document to prove as such. In *James Muigai Thungu vs County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



Also, further, Section 108 of the [Act](#) states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of [Act](#) refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

7. It was upon the Defendant therein to prove his case and not put the Plaintiff to strict proof as to the existence of such an agreement. At no point did the evidential burden shift from the Defendant to the Plaintiffs in terms of proving ownership of the suit premises. The burden was cast upon the Defendant who had the burden of proving the fact that he was the legal or beneficial owner of the suit premises, since he was the one who desired for the court to believe the existence of that fact. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in [Jennifer Nyambura Kamau v Humphrey Mbaka Nandi](#) [2013] eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the [Evidence Act](#) places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the [Evidence Act](#) provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the [Evidence Act](#) provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

8. It is the view of this court that it can only make a determination on the ownership of the suit property based on the title documents and the supporting documents thereto. Section 26 of the [Land Registration Act](#), stipulate that;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

9. In their counterclaim, the Defendant seeks a declaration that Plaintiffs are in breach of the ‘description and division of possessions’ agreement. And for the Court to be pleased to issue a declaration that the suit parcel of land belongs to the Defendant solely. The Defendants have failed to produce any evidence to prove the same.



10. Since the title issued to all the four parties herein by transfer dated 27th December 2011 (PEx4) was held in common, Section 91 (6) of the [Land Registration Act](#), which states that;

“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.”

11. The parties herein held interest in the suit property as tenants in common, which meant that they held the suit property in an equal undivided shares. Each of them 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. From the evidence adduced by the Plaintiffs, it is clear to the Court that despite holding title to the suit property as tenants in common, the Defendant is out to oust the Plaintiffs from the suit property.

12. It is the view of this court that the actions of the Defendant to exclusively use the property to his benefit is not justifiable. The parties herein are parents and siblings, and in order to live in harmony, the law allows them to partition their interest where they hold title as tenants in common. Section 94 of the [Land Registration Act](#), provides that;

“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 Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of title or certificate of lease, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.”

13. Unless and until the parties herein are able to apply to the Land Registrar for the partition the suit property, no party is allowed as stated in Section 91 (6) to deal with their undivided interest in the suit property at the exclusion of the other tenants in common. I am not inclined to issue orders to forcefully sale the suit property without the consent of all the parties. The claim for loss income and general damages has not been proved and the same will not be awarded.

14. Consequently, I find the Defendant has failed to prove his counterclaim on a balance of probabilities and the same is dismissed with no orders as to costs. I find that the Plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. Declaration that the Plaintiffs and the Defendant are the Legitimate Registered Proprietors as Tenants in Common of all that Parcel Reference Subdivision No. 2107 (Original No. 1669/1) of Section I Mainland North, situated in the Mombasa Municipality, containing by measurement Nought Dec Two Three Seven Seven (O .2377) of a Hectare or thereabouts, and all Developments thereon (the "Suit Property")
2. A declaration that the Defendant' s Occupation, Enjoyment and Derivative Use of the Suit Property w. e. f Year 2015 has therefore been in Trust for All Tenants in Common thereof.
3. A permanent injunction do issue restraining the Defendant, whether by himself, his Agents/ Servants/ Employees/ Assigns or whosoever Claiming through him, from Wasting, Disposing of the Suit Property, Interfering with the Plaintiffs' Possession, Occupation, Enjoyment and Derivative Use of the Suit Property, and/or in any Manner whatsoever, Dealing with the Suit Property in a Manner adverse to the Plaintiffs' Interest therein;



4. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

