



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 195 OF 2017

IN THE MATTER OF THE ESTATE OF STEPHEN CHERUIYOT KOSITANY (DECEASED)

ROBINSON LIMO KOSITANY.....APPLICANT

VERSUS

JENNIFER JEMUTAI KOSITANY.....RESPONDENT

RULING

1. By way of summons dated 30th October, 2017 and brought under **section 45 and 47** of the **Law of Succession Act Cap 160 Laws of Kenya** and **rule 73** of the **Probate and Administration Rules**, the Applicant is seeking for orders that:

- a. Pending the hearing of this application *inter partes*, Jennifer Jemutai Kositany, whether by herself, agents, nominees and or any person whatsoever, be and are hereby restrained from transferring, disposing, charging, leasing, pledging or in any manner whichever the property known as L.R. No. 2327/32 situate Karen Nairobi.
- b. Pending the hearing of this application *inter partes* the property known as L.R. No. 2327/32 situate in Karen Nairobi be leased by the Applicant in consultation with the beneficiaries of the estate of the late Stephen Cheruiyot Kositany, and the proceeds be deposited in an account to be held by the Applicant but with open accounting to all beneficiaries and the Honorable Court.
- c. Pending the hearing and conclusion of the Summons for letters of Grant herein until the Confirmation of Grant or until further orders of the Court, Jennifer Jemutai Kositany do render an account before the Honorable Court for all the proceeds, whether *mesne* or lease proceeds over L.R. No. 2327/32 situate Karen Nairobi from 29th January, 1994 until October 2017.
- d. Pending the hearing and conclusion of the Summons for letters of Grant herein until the Confirmation of Grant or until further orders of the Court, Jennifer Jemutai Kositany, whether by herself, agents, nominees and or any person whatsoever be and are hereby restrained from transferring, disposing, charging, leasing, pledging or in any manner whichever the property known as L.R. No. 2327/32 situate Karen Nairobi.

2. The application is premised on the grounds that the property known as L.R. No. 2327/32 in Karen Nairobi is in real danger of dissipation by acts of illegal transfer by Jennifer Jemutai Kositany, a beneficiary of the deceased's estate, who has rented the property for residential purposes but the proceeds thereof have not been accounted for. Further that the said beneficiary is purporting to transfer the property to a limited liability company known as Jepha Holdings Limited Company in which the estate has no shareholding or interest.

3. In support of the application, the Applicant swore an affidavit on 30th October, 2017 in which he deposed that he is a son of the late Stephen Cheruiyot Kositany the deceased herein, who died intestate on 28th January, 1994. The letters of grant of administration are yet to be issued or confirmed. He asserted that the illegal acts of the beneficiary Jennifer Jemutai Kositany constitute intermeddling with the property of a deceased person contrary to **section 45** of the **Law of Succession Act**. He urged that unless the Honorable Court grants the reliefs as sought, there shall be actual prejudice to the deceased's estate and the beneficiaries thereof.

4. The Respondent filed a replying affidavit sworn by herself on 13th February, 2018 in which she stated that the present application is an affront to the Respondent's constitutional right to own property and enjoy benefits that flow from such ownership. She asked the court to dismiss the application with costs in the interest of justice and fairness.

5. She deposed that she is a widow to the deceased and contended that the suit property does not form part of the deceased's estate and the orders sought cannot be granted. The basis of the Respondent's case is that the suit property was jointly owned and upon the demise of one of the co-owners, the entire property vests in the remaining owner under the principle of *jus accrescendi*.

6. Annexed to the replying affidavit is a Conveyance dated 7th September, 1981 between William Hugh Hindley and Olga Ann Oliver as

vendors and Stephen Cheruiyot Kositany, the deceased herein, and Jennifer Jemutai Kositany as the purchasers. The Respondent drew the court's attention to the words of the agreement which state that "...the vendors as beneficial owners **HEREBY GRANT AND CONVEY** unto the purchasers as joint owners of **ALL THAT** piece or parcel of land comprising four decimal four two (4.42) acres or thereabouts...".

7. The Respondent asserted that from the wording of the Conveyance, it is clear that the suit property was jointly owned and upon the demise of the deceased, the property vested solely in her under the doctrine of survivorship. Reasons for which, the property in question is free property and does not therefore constitute the deceased's estate. She urged that the Applicant's claim of intermeddling is therefore untrue, erroneous and founded on a misunderstanding of facts and the law.

8. Learned Counsel Mr. Oduor filed written submissions dated 3rd April, 2019 on behalf of the Applicant in which he submitted that the orders sought in the present application are crafted for the sole purpose of utilization of the suit property for the benefit of all the beneficiaries of the estate of the deceased herein. That the sole issue for determination by the court should therefore be whether the suit property constitutes the deceased's estate.

9. According to Mr. Oduor, the deceased and the Respondent owned the suit property as tenants in common and not jointly as alluded to by the Respondent. Counsel made reference to the descriptive part of the Conveyance as cited by the Applicant but stated that a Conveyance is a contract. That as such, the Court has a duty to interpret the Conveyance by employing the rules of interpretation of contracts to ascertain the true intention of the parties *to wit* whether their intention was to own the suit property jointly or in common.

10. Mr. Oduor contended that courts have adopted the principle of four corners of an instrument in the interpretation of a contract which insists that the meaning of a document should be derived from the document itself without reference to anything outside of the document. Counsel referred to the case of **Fidelity Commercial Bank Limited vs. Kenya Grange Vehicle Industries Limited [2017] eKLR** in which the Court of Appeal (Ouko, Kiage, Murgor, JJ.A) observed thus:

"Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it."

It was Mr. Oduor's submission that to decipher the interest that was being conveyed, the court will have to look at the conveyance as a whole and not just focus on one part of the conveyance.

11. Mr. Oduor argued that joint tenancy and tenancy in common are forms of joint ownership of land or co-tenancy. Counsel urged that the words joint owner and joint tenant cannot therefore be used interchangeably since they do not mean one and the same thing. That the only distinguishing features of the two are the rights and the interests of the parties. To buttress his argument, Counsel cited the case of **Cornella Nabangala Nabwana vs. Edward Vitalis Akuku & 2 others [2017] eKLR** in which Eboso J outlined the distinction as follows:

"The key distinguishing features of joint tenancy are the right of survivorship and the "four unities". The right of survivorship implies that upon the death of one joint tenant, his interest in the land passes to the other joint tenants by the right of survivorship (*jus accrescendi*). This also implies that an interest held by a joint tenant cannot pass to another person through a will or through intestacy. It automatically passes to the surviving tenant(s)...The four unities of a joint tenancy are the unities of possession, interest, title and time...In contrast, tenants in common hold their respective interests in undivided shares and each tenant in common has a distinct share in the property which has yet to be divided among the co-tenants. Secondly, in tenancy in common, there is no right of survivorship. This implies that when a tenant in common dies, his interest in the land passes under his will or intestacy."

12. Counsel urged that the Applicant having demonstrated that the suit property was co-owned as a tenancy in common, the interest of the deceased in the property should pass under intestacy as he died without a will. Further that pending the grant of letters of administration, the deceased's property must be preserved as it is currently at risk of dissipation by the Respondent.

13. Learned Counsel Ms. Mutua filed written submissions dated 30th May, 2019 on behalf of the Respondent in opposition to the application. Counsel submitted that the Respondent acquired the suit property lawfully and should thus enjoy her proprietary rights guaranteed under **Article 40** of the **Constitution**. Counsel asked the court to protect the Respondent's proprietary rights to the suit property by declaring her the sole proprietor and setting aside the orders granted that restricted dealings in the suit property.

14. Ms. Mutua contended that the question for determination herein is whether the deceased was legally competent to freely dispose the suit property during his lifetime. That the law that was in force at the time when the deceased acquired interest in the property and at the time of his death was the **Registered Land Act CAP 300** which has since been repealed by the **Land Registration Act No. 3 of 2012**.

15. Ms. Mutua contended that **section 101(1)(a)** of the **Registered Land Act** required that an instrument made in favor of two or more persons, and the registration giving effect to it shows whether those persons are joint proprietors or proprietors in common. That this provision is now referred to under **section 91(3)** of the **Land Registration Act, 2012**.

16. It was Ms. Mutua's submission that the Respondent and the deceased who were married at the time of acquiring the suit property were guided by the express provisions of the law which required that the instrument made in their favor indicate the type of co-ownership that the parties intended. Counsel urged that the duly registered conveyance clearly indicates the intention of the purchasers to be joint proprietors and upon registration, both the deceased and the Respondent were conferred absolute proprietorship of the suit property.

17. Further that **section 102(1)** of the **Registered Land Act** provided that where land, lease or charge is owned jointly, no proprietor was entitled to any separate share in the land, and dispositions could only be made by all the joint proprietors and on the death of a joint proprietor, his interest would vest in the surviving proprietor or the surviving proprietors jointly.

18. Ms. Mutua asserted that the suit property does not form part of the deceased's estate as it was transmitted to the Respondent as the surviving tenant upon the deceased's death. That consequently, the Respondent's dealings in the suit property do not amount to intermeddling with the free property of the deceased since the suit property belongs solely to the deceased and does not therefore form part of the deceased's estate. Counsel urged that the Respondent is therefore entitled to be registered as the sole proprietor of the suit property.

19. Ms. Mutua contended that if the Respondent and the deceased intended to own the property as tenants in common, they would have specified what share or value is assignable to each of them. They did not however purport to assign any shares of the suit property in any way, whether by any legally enforceable document or by conduct.

20. To buttress the Respondent's case, Ms. Mutua cited the persuasive decision in **Moses Bii vs. Kericho District Land Registrar & Another Civil Suit No. 8 of 2014 [2015] eKLR** in which Sila J while deliberating on a dispute in which a parcel of land was registered in the names of four (4) proprietors opined thus:

“My view is that if the register does not reflect whether the land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship where the same has not been explicitly indicated, should only be presumed in the clearest of circumstances where there can be no shred of doubt the contemplation of the parties was to have the property held jointly, I for myself cannot think of such a state of affairs other than where the proprietors are spouses, though I cannot rule out other situations, but they really must be so clear as to obviate debate on it.”

Counsel urged that the marital status of the proprietors at the time of entering the contract for the purchase and ownership of the suit land is an indication of their intention to own it together for the benefit of each other.

21. I have considered the pleadings and the submissions filed by the parties hereto in support of and in opposition to the application. Both parties hereto are in agreement that the suit property known as L.R. No. 2327/32 situate in Karen Nairobi was acquired by the deceased and the Respondent. What is disputed is their rights as co-owners of the property. To determine this, I will interrogate whether the property was held under joint tenancy or tenancy in common.

22. Joint tenancy and tenancy in common are forms of co-ownership of land. They are recognized under **section 91** of the **Land Registration Act**. According to **Cheshire & Burns, Modern Law of Real Property 18th edition**, 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. **Megarry & Wade, The Law of Real Property, 7th edition** states that the intimate nature of a joint tenancy is shown by its two principal features, the right of survivorship and the “four unities”.

23. The right of survivorship, also known as *jus accrescendi*, means that when one joint owner dies, his interest in the land passes on to the surviving tenant. A joint tenancy cannot therefore 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.

24. There is a thorough and intimate union between joint tenants. Together, they form one person. **Megarry & Wade** at page 490 - 493 state that this unity is fourfold, consisting of unity of possession, interest, title and time. Unity of possession implies that each co-owner is entitled to possession of any part of the land as the other. 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 requirement is satisfied if the joint tenants acquired their rights by the same conveyance, or if they simultaneously took possession of the land. Unity of time means that the interest of each tenant must vest at the same time.

25. Tenancy in common differs from joint tenancy in that tenants in common hold property in undivided shares. Each share is undivided in the sense that its boundary is not demarcated, but nevertheless his right to a definite share exists. While the tenancy in common lasts, one cannot therefore say which of them owns any particular parcel of land. The doctrine of survivorship is inapplicable to tenancies in common, so that when one tenant dies, his share passes to his personal representatives and not to the surviving tenant.

26. The documents on record which shed light on the ownership of the suit property are a conveyance dated 7th September, 1981; a Transfer of Mortgage dated 13th September, 1985; an indenture dated 7th September, 1981; a Transfer form dated 14th May, 1981 and issued on 29th June, 1981.

27. An examination of the documents reveals that the deceased and the Respondent acquired the suit property being L.R. No. 2327/32 in 1981 for the sum of Kshs. 1,350,000/= and both registered as proprietors. All that comes to the fore upon a reading of the Conveyance dated 7th September, 1981 is the names of the vendors and the purchasers; the date on which the property vested in the vendors; the purchase price; the testimonium and the execution and attestation.

28. In advancing the Applicant's case, Mr. Oduor referred to the preamble of the Conveyance, where there is use of the phrase “...which expression shall where the context so admits include their and each of their respective personal representatives and assigns.” Counsel asserted that the phrase essentially means that in the absence of a party or in circumstances which render a party incapable of exercising his rights and enjoying his interests in the property, then an assign or a personal representative can exercise the rights and enjoy the interest on their behalf. Counsel urged that such a phrase demonstrates that the interests and the rights in the suit property being conveyed was that of a tenancy in common and not joint tenancy.

29. Indeed, there is an indication in the Conveyance that both the expression “the Vendors” and “the purchasers” shall where the context so admits include their and each of their respective personal representatives and assigns, on each of their parts. A wholesome reading of the conveyance however reveals that this does not in any way indicate that the Vendors held the property as tenants in common, or that the Purchasers would acquire the interest in the property as tenants in common. This is demonstrated under the first recital which provides thus:

“WHEREAS

(a) By virtue of a conveyance dated the Forteenth day of February 1969 (registered in the Government Lands Registry at Nairobi in Volume No. 35 Folio 448/8) and made between EDWARD VICTOR WRIGHT CADE and ELIZABETH CLARE CADE (therein described) of the one part and the Vendors of the other part ALL THAT piece of parcel of land known as Land Reference Number 2327/32 situated in the City of Nairobi in the Nairobi Area of the said Republic comprising Four decimal Four Two (4.42) acres or thereabouts being the property hereinafter more particularly described became vested in the Vendors for an estate in fee simple”

30. According to **Cheshire & Burn’s** at page 493, if an estate is given to co-owners in “fee simple” without the addition of any restrictive, exclusive or explanatory words, the law gives effect to the whole of the grant by creating an equal estate in them both. This means that from the point of view of their interest in the land, they are united in every respect. As such, if the phrase “...which expression shall where the context so admits include their and each of their respective personal representatives and assigns” implied tenancy in common, it would not have been used in respect of the Vendors who acquired the property in fee simple and therefore as joint tenants. The phrase should therefore be interpreted to mean their assigns or where one predeceases the other, the respective personal representative of the surviving tenant.

31. If, however, the grant contained words of severance intended to show that the co-owners are to take separate and distinct shares such as use of the word “equally”, then the result would be the creation of a tenancy in common. There is however nothing in the Conveyance to indicate such an intention. What the material presented herein demonstrates is that the parties held the whole suit property together and no share by themselves. The deceased and the Respondent enjoyed not only a unity in title and possession but also a unity in time and interest.

32. The words of the agreement propel the argument that the suit property was held under joint tenancy. The relevant phrases being “...the vendors as beneficial owners HEREBY GRANT AND CONVEY unto the purchasers as joint owners (emphasis mine) ALL THAT the said piece of land...TO HOLD the same unto and the use of the Purchasers...” and “...the Purchasers hereby jointly and severally covenant with the Vendors...”

33. I am alive to the fact that the use of the expressions “as joint owners” does not automatically rebut the equitable presumption of a tenancy in common as it is silent to the beneficial interest of the parties. The second expression “jointly and severally” which is a contradiction in terms, has however been solved by the courts, holding that the first word prevails in a deed (thus creating a joint tenancy), but the last in a will. This is deliberated at length at page 496 of **Megarry & Wade’s The Law of Real Property**. In the instant case, the expression is used in a deed and the first word therefore prevails. The result is that the suit property vested in the deceased and the Respondent as joint tenants.

34. Having found that the suit property was held under joint tenancy, upon the deceased’s death, his interest in the property extinguished and accrued to the Respondent as the surviving tenant. The property is therefore solely that of the Respondent and does not constitute the deceased’s net intestate estate.

35. The upshot of the above is that the application brought by way of summons dated 30th October, 2017 fails and is hereby dismissed in its entirety. Costs shall be in the cause. It is so ordered.

SIGNED DATED and DELIVERED in open court this 24th day of September, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondent.