



**Nyamibiri & another v Nyamibiri (Environment & Land Case 92 of 2018)
[2023] KEELC 22029 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 92 OF 2018
MN KULLOW, J
NOVEMBER 29, 2023**

BETWEEN

SUGUTA NYAMIBIRI 1ST APPLICANT

ROBI MUKIRA NYAMIBIRI 2ND APPLICANT

AND

SAMWEL CHACHA NYAMIBIRI RESPONDENT

JUDGMENT

1. The Applicants herein commenced this suit by way of an Originating Summons dated 22nd July, 2018 against the Respondent seeking a determination of the following questions: -
 - i. Is the co-registered owner of Bukira/ Bwisaboka/ 702 Turuya Nyamibiri the same person as Samwel Chacha Nyamibiri?
 - ii. Was the change of name from Turuya Nyamibiri lawful?
 - iii. Is the said Turuya Nyamibiri alive? If not, who as between the parties is entitled to his ¼ share of land parcel No. Bukira/ Bwisaboka/ 702
 - iv. Who pays the costs of this Summons?
2. The Originating Summons is premised on the Applicants' Supporting Affidavit dated 23rd July, 2018, sworn by the 1st Applicant on his own behalf and on behalf of the 2nd Applicant. He deponed that he is one of the co-registered owners of the suit land No. Bukira/ Bwisaboka/ 702 measuring approx. 35.5Ha. That the suit land was registered amongst 4 brothers as Joint Co-Owners to wit; Chacha Nyamibiri, Mukira Nyamibiri, Turuya Nyamibiri and the 1st Applicant, with each owner being entitled to ¼ share of the suit land. He stated that two of the co-owners are since deceased; Chacha Nyamibiri and Mukira Nyamibiri. However, no one knows the whereabouts of the 3rd co-owner Turuya Nyamibiri since the early 1950's.



3. It is his claim that on or about 25/05/2012; the Respondent unlawfully effected a change of name on the Land Register from Turuya Nyamibiri, who is his uncle to himself.
4. It is therefore his contention that the Respondent's actions of changing the names as contained in the Land Register from Turuya Nyamibiri to himself was unlawful and in clear contravention of the provisions of section 39 of the Law of Succession Act. He thus argued that the name of Turuya Nyamibiri should be restored on the land register and the Respondent be ordered to desist from interfering with the estate of Turuya Nyamibiri. He urged the court to allow the suit and grant the orders sought.
5. The Respondent entered Appearance through the firm of M/S Mudeyi Okumu & Co. Advocates. From a perusal of the court record I have not seen any Replying Affidavit in response to the allegations raised against him in the Originating Summons. However, I do note that the Supporting Affidavit sworn on 26/10/2020 in support of the Notice of Motion Application evenly dated touches on some of the issues raised in the main suit and I will proceed to consider the same.
6. It is the Respondent's contention that the name Turuya Nyamibiri is his nickname and both names refer to the same person who is himself. It was his claim that he followed the due process in effecting the changes of his name from Turuya Nyamibiri to his present official names of Samwel Chacha Nyamibiri.
7. The Originating Summons was canvassed by way of written submissions. Both parties filed their rival submissions which I have read and considered.

Applicants' Submissions

8. Counsel for the Applicants reiterated the contents of the 1st Applicant's Supporting Affidavit. It was also his contention that from a look at the Green Card annexed to the Affidavit and marked "SN 1" both names of Turuya Nyamibiri and Samwel Chacha Nyamibiri appear on the green card with each holding ¼ share and thus dismissed the claims by the Respondent that both names refer/ belong to him.
9. He further submitted that change of name is done by way of a deed poll and not arbitrarily in the land registry. He urged the court to be guided by the provisions of section 39 of the Laws of Succession Act and to order for the nullification of the title thereof issued in favour of the Respondent.

Respondent's Submissions

10. The Respondent's counsel relied on the witness statements of the Respondent, Pauline Chacha, Jackson Chacha Nyamibiri and Samson Mwita Marwa. He summarized the contents of the Respondent's witness statement and further averred that all the other witnesses confirmed the position by the Respondent. He thus urged the court to dismiss the case filed against Respondent since all the Applicants have always dealt with him knowing him to be both Samwel Chacha Nyamibiri and Turuya Nyamibiri

Analysis and Determination

11. I have reviewed the pleadings herein, the affidavit exhibit and parties' rival submissions in totality and it is my considered opinion that the sole issue arising for determination is: -
 - a. Whether the Originating Summons dated 22.07.2018 is merited and the Applicants are entitled to the reliefs sought.



12. It is the Applicants claim that the suit land No. Bukira/ Bwisaboka/ 702 measuring approx. 35.5Ha was jointly registered in the names of 4 brothers with each being entitled to a ¼ share of the entire suit land. Two of the joint owners are since deceased and their beneficiaries are entitled to their respective portions whereas no one knows the whereabouts of Turuya Nyamibiri, who is also a joint owner thereof.
13. It is their contention that the Respondent without any color of right; either as a son or beneficiary of the said Turuya Nyamibiri, unlawfully changed the register of the said parcel of land No. Bukira/ Bwisaboka/ 702, by removing the name of the said Turuya Nyamibiri and adding his name in his place.
14. The Respondent on the other hand maintained that Turuya Nyamibiri and Samwel Chacha Nyamibiri refer to one and the same person who is him. In his submissions and witness statement, it was his contention that he was named Turuya Nyamibiri by his parents but was later advised to change his name to that of his father, Samwel Chacha Nyamibiri.
15. It was also the Respondent's claim that when he went to correct his name in his National Identity Card; the ID Department advised him to correct the name in the Land Register because it is his land and the ID was also changed.
16. Respectfully, this is not the position in law. It is well known that for one to change his name in this country they are required to lodge a Deed Poll and follow the requisite procedure before the said name is changed. There is no evidence of such procedure being followed by the Respondent in the instant case. No Deed poll was adduced in evidence to show the change of the Respondent's name from Turuya Nyamibiri to that of Samwel Chacha.
17. Further, the Respondent has not adduced any evidence whatsoever in support of his averment that he was previously known as Turuya Nyamibiri. Section 107 of the Evidence is clear that he who alleges must prove. In the absence of any proof of these averments, the claims by the Respondent and his witnesses remain mere allegations without probative value.
18. It is not in dispute that Turuya Nyamibiri is one of the co- owners of the suit land No. Bukira/ Bwisaboka/ 702 and is entitled to ¼ share. I have looked at the copy of the Green Card/ Register of the suit land herein marked as Annexure "SN 1". The first registration was on 28.05.1973 in the names of Chacha Nyamibiri, Siguta Nyamibiri, Mukira Nyamibiri and Turuya Nyamibiri with a share of ¼ share each. The second registration was effected on 25/5/2012 in the names of 4 proprietors; Chacha Nyamibiri, Siguta Nyamibiri, Mukira Nyamibiri and Samwel Chacha Nyamibiri of ¼ share each. The final registration was effected on 23/2/2016 in the name of Siguta Nyamibiri and Samwel Chacha Nyamibiri of ¼ and ¾ share respectively.
19. The suit property herein was registered in the year 1973 under the Registered Land Act, Chapter 300, Laws of Kenya (now repealed). Registration of land in the names of more than one person and the characteristics of the two kinds of proprietorship was provided under sections 101, 102 and 103 of the Registered Land Act (now repealed) which stated as follows: -

" 101.

- (1) An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-
 - (a) whether those persons are joint proprietors or proprietors in common; and



- (b) where they are proprietors in common, the share of each proprietor.

102(1). Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –

- (a) dispositions may be made only by all the joint proprietors; and
- (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly...

103(1). Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate. ...”

- 20. However, it is important to note that from the said register, it is not clearly indicated whether the registration of the proprietors thereof is under tenancy in common or under joint tenancy. While the Applicants contend that the registration was in the joint names of the 4 brothers and the same is therefore joint tenancy, I do note that from the register, the share entitlement of each proprietor is clearly indicated.
- 21. The distinction between joint tenancy and tenancy in common was made in *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (2012) eKLR as follows: -

“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 (jus 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.....

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....”

- 22. In addition, I am guided by the dictum by S. Munyao J. in *Moses Bii v Kericho District Land Registrar & another* [2015] eKLR where in considering whether the registration of several proprietors is joint or in common, he stated that: -

“My view is that if the register does not reflect whether 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 that the contemplation of the parties was to have the property held jointly.”

23. In view of the foregoing, it is apparent that where land is owned in common, each proprietor has a separate share, only that the same is undivided and held together with the other proprietors as one whole. Thus, if one proprietor dies, his share does not vest in the surviving proprietor, but vests in his estate. I will therefore proceed to make the presumption that the suit land was registered in the names of the 4 brothers; as tenants in common. Thus, in the event of death of a registered proprietor, his share vests in his estate.
24. Further, it is the claim by the Applicants that no one knows the whereabouts of Turuya Nyamibiri since the 1950's and on advice from his counsel, he stated that the said Turuya should be presumed dead.
25. Presumption of death is an independent procedure and the *Evidence Act* provides the procedural steps to be followed before such declaration is made. Further, pursuant to the provisions of Article 162 (2) (b) of *the Constitution* of Kenya as read with section 13 of the *Environment and Land Court Act*, this court lacks the requisite jurisdiction to make such declaration which is a preserve of the High Court and to that end, parties are hereby directed to file the necessary pleadings in the right forum for purposes of making such a declaration.
26. Lastly, from the copy of the register adduced in evidence, it is clear that the first registration was effected in the name of Turuya Nyamibiri. As held earlier in the judgment, it is not clear is on what basis and/or justification the name of Turuya Nyamibiri was removed from the register and replaced by the Respondent's name in the registration effected on 25/5/2012 and the subsequent registration effected on 23/2/2016. The Respondent did not provide any sufficient and satisfactory explanation on the reason and the process followed before effecting the said changes. His explanation that both names refer to him has not been substantiated and the same does not therefore hold water.
27. In the absence of any sufficient explanation on the process followed before effecting the said changes on the land register and replacing the name of one of the joint owners without lawful justification; I find that the said actions by the Respondent are unlawful and unjustified.
28. The totality of the foregoing is that the Applicants have sufficiently demonstrated their claim against the Respondent, that the procedure and the change effected on the register of removing the name of Turuya Nyamibiri by the Respondent was unlawful. Therefore, it is my finding that the Applicants have proved their claim on a balance of probabilities and are hereby entitled to the reliefs sought.

Conclusion

29. The upshot of the above is that the Applicants have proved their claim against the Respondent and I accordingly allow the Originating Summons dated 22nd July, 2018 on the following terms;
 - i. A Declaration be and is hereby made that the co-registered owner of Bukira/ Bwisaboka/ 702 Turuya Nyamibiri is not the same person as Samwel Chacha Nyamibiri (Respondent herein)
 - ii. A Declaration be and is hereby further made that the change of name from Turuya Nyamibiri to Samwel Chacha Nyamibiri in the Register of Land Parcel No. Bukira/ Bwisaboka/ 702 was unlawful.
 - iii. An Order be and is hereby made directed to the Land Registrar to remove the name of Samwel Chacha Nyamibiri and for the register to revert back to the name of the Turuya Nyamibiri as one of the co-owners of the suit parcel.



- iv. Parties be and are hereby ordered to institute the necessary steps/ procedure on the declaration of the status of Turuya Nyamibiri.
- v. Each party to bear its own costs of the suit.

It is so ordered!

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 29TH DAY OF NOVEMBER, 2023.

MOHAMED N. KULLOW

JUDGE

