



**Nkanata ((Suing as the Administrator of the Estate of Jediel Nyagah
Nkanata (Deceased)) v Kanugu (Environment and Land Appeal
E007 of 2023) [2023] KEELC 22569 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E007 OF 2023
AK BOR, J
DECEMBER 7, 2023**

BETWEEN

**EDWARD BUNDI NKANATA APPELLANT
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF JEDIEL NYAGAH
NKANATA (DECEASED))**

AND

ESTHER KANUGU RESPONDENT

JUDGMENT

1. This appeal emanated from the judgment and decree of Hon. Ben Mararo, Senior Principal Magistrate in Nanyuki CMELC Case No. 56 of 2019 which was delivered on 27/9/2022. The subject matter of this suit is the land known as Naromoru Block 1 (Ragati) 867. According to the title deed and official search produced before the trial court, this property was registered in the names of Jediel Nyaga Nkanata and Julius Kaaria Ikiara, who have since died.
2. In the suit before the Magistrate's Court, the Appellant, acting as the Administrator of the Estate of Jediel Nyaga Nkanata, sued the Respondent, who is the widow of Julius Kaaria Ikiara seeking an order to compel the Respondent and her agents to move out and vacate the rental premises on the suit property and a permanent injunction to restrain the Respondent and her agents from dealing with the suit property. He also sought to have the Respondent give an account of the rental income she had collected from the suit property and general damages for trespass.
3. The matter was heard and the parties adduced evidence in support of their cases. The trial court established that the Respondent was the widow of the late Julius Kaaria Ikiara and that the suit property was owned by both the late Julius and the late Jediel in equal shares. The Respondent produced a copy of the minutes for a meeting held on 26/7/2014 where it was discussed that the suit



property was divided into two parts, A and B. Her late husband occupied part B and claimed that she is still in occupation of that portion of the suit property.

4. The Learned Magistrate relied on *Isabel Chelangat v Samuel Tirop Rotich & 5 others* (2012) eKLR in which Justice Sila Munyao distinguished between joint tenancies and tenancies in common and concluded that in this case, the Appellant was only entitled to the portion of the suit property which his late father, Jediel Nkanata, owned while the Respondent as the surviving tenant of Julius Kaaria was to inherit his portion. He found that the Appellant could not claim what did not belong to him despite the fact that the Respondent had not taken out letters of administration.
5. Being aggrieved by that decision, the Appellant filed the Memorandum of Appeal dated 19/4/2023 setting out eight grounds of appeal. The Appellant contended that the Learned Magistrate erred by failing to hold that the letters of administration granted to him in Nanyuki HC Succession Cause No. 33 of 2015 was sufficient proof of ownership of the suit land and that since the Respondent had not taken out letters of administration for the estate of Julius Kaaria Ikiara she had no right to claim the suit property. Further, the Appellant faulted the Learned Magistrate for finding that his late father owned the land as a joint owner and not as tenant in common such that the issue of survivorship would not arise.
6. The other grounds of appeal are that the Learned Magistrate erred when he failed to hold that the property of a deceased could not be subdivided before obtaining letters of administration and for holding that the suit property was mistakenly listed by the Appellant among the assets of the Estate of the Appellant's late father in the succession cause.
7. The Appellant faulted the trial court for finding that he failed to prove his case and prayed that this court sets aside the judgment, order and decree of the Magistrates Court and substitute it with an order allowing his suit dated 8/7/2019 with costs. The Appellant also prayed for the costs of the appeal.
8. The appeal was canvassed through written submissions. The Appellant filed submissions dated 20/7/2023 where he submitted that the trial court erred by not finding that he was entitled to the whole of the suit property since the High Court had distributed the property in Succession Cause No. 33 of 2015. He contended that the trial court could not interfere with the findings of a superior court and argued that the Respondent should have approached the High Court to challenge the Certificate of Confirmation of grant issued on 19/9/2017. That having failed to do so, the Respondent remained a trespasser on the suit property. Further, he argued that since the Respondent had not filed a succession cause, she had no right to intermeddle with the suit property even if Julius Kaaria was her husband.
9. The Appellant contended that the trial court had no jurisdiction to go against the findings of the High Court in Succession Cause 33 of 2015 and that it should have ruled that he was the owner of the suit property. Further, he contended that his late father owned the suit property in a tenancy in common where the doctrine of survivorship does not apply. That since the Respondent did not show evidence that she had taken out letters of administration, she was not the administrator of the late Julius Kaaria Ikiara. He urged that in accordance with Section 91 of the *Land Registration Act*, the suit property should be treated as his late father's estate and that the Respondent's dealing with the suit property amounted to intermeddling contrary to section 45(1) of the *Law of Succession Act*.
10. The Appellant submitted that in *Eliab Ojow Odhiambo & Others v Habakuk Onyango Abongo* Civil Case No. 23 of 2011, it was held that under tenancy in common the doctrine of survivorship did not apply and that an owner under tenancy in common may leave his share in death to a person in his will. Further, that the Respondent had no right to take possession of any part of the suit property without letters of administration. He also relied on In *re Estate of John Gakunga Njoroge (Deceased)* [2015]



eKLR on the point that a person can only lawfully deal with the estate of a deceased person pursuant to a grant of letters of administration issued under the [Law of Succession Act](#).

11. The Appellant contended when his father died and a grant was issued on 19/9/2017, the suit property was among the properties that he and the sister Doreen Kainyu Nkanata were to share equally. He contended that since the grant has not been revoked, the suit property belonged to the estate of the late Jediel Nyaga Nkanata and the Respondent remained a trespasser and an intermeddler.
12. On his part, the Respondent submitted that the jurisdiction to deal with title to the suit property was with the Environment and Land Court and not the High Court since the dispute relates to ownership land and was not a succession cause. He surmised that the trial court was therefore within the scope of its jurisdiction. The Respondent added that the suit property was owned in equal shares by her late husband and the Appellant's late father as tenants in common as shown by the official search and copy of the title deed. She went on to elaborate that the key features of a tenancy in common outlined in [Hannah Nyamunya \(Sued as the Administrator of the Estate of Njenga Muchiri also known as Samuel Njenga Muchiri\)](#) [2015] eKLR applied to this case where each tenant had a distinct share of the undivided property and there was no right of survivorship among the co-owners. Further, that the procedure to be followed where one proprietor in common died was provided in Section 61 [Land Registration Act](#) and that the personal representative was entitled to be registered.
13. The Respondent added that to terminate a tenancy in common, the law allowed co-owners to agree to sever the co-ownership by partition or by acquiring the interests of another co-owner to become solely entitled or by the sale of the common property and division of the proceeds as shown in [Santaben Ramniklal Parmar & Another v Beatrice Waruguru Gituru & 2 Others](#) [2019] eKLR as well as Sections 94 and 96 of the [Land Registration Act](#).
14. It was argued that the certificate of confirmation of grant attached by the Appellant did not give him or his sister the power to grab or deal in the assets of the estate of the late Julius Kaaria Ikiara of whom the Respondent is the widow. The Respondent argued that such attempts to grab his assets should be viewed as attempts to intermeddle with the estate of a deceased person which is an offence under Section 45 of the [Law of Succession Act](#). The Respondent contended that as the widow of Julius Kaaria Ikiara she was entitled to remain in her late husband's land and take out letters of administration to deal with it.
15. The Respondent concluded that the Appellant was not entitled to the prayers sought since the registration is a common tenancy and not a joint tenancy and that the Appellant ought to bear the costs of the suit since he wanted to grab the share of the Respondent's land. She relied on the case of [Hannah Nyamunya \(Sued as the Administrator of the Estate of Njenga Muchiri also known as Samuel Njenga Muchiri\)](#) [2015] eKLR.
16. In the suit before the Learned Magistrate, the Appellant sought an order to compel the Respondent to move out and vacate the commercial and rental premises on the suit property and an injunction to restrain her from interfering with his use, ownership, management or possession of the suit property. The Appellant pleaded at paragraph 4 of the plaint that his late father was registered as the absolute proprietor of the suit property yet the land is registered in his late father's name and that of Julius Kaaria Nkanata.
17. The Learned Magistrate narrowed down the issues for determination as firstly, whether the Respondent was legally married to Julius Kaaria Ikiara and secondly, whether the Appellant was entitled to the reliefs he sought in the suit. The trial court made a finding that the Respondent had proved the existence of a marriage between herself and the late Julius Kaaria Ikiara. The court stated that when a joint owner died, the property passed to the surviving tenant by virtue of the doctrine of



- survivorship. However, the trial court erred when it found that the suit land was jointly owned by the Appellant's late father and the late Julius Kaaria Ikiara for theirs was ownership in common.
18. The suit property was jointly owned by Jediel Nyaga Nkanata and Julius Kaaria Ikiara as can be seen from the title deed issued in both their names on 24/4/2003. Since the instrument of transfer of the interest in the land did not specify the nature of their rights, it is to be presumed that they held the land as owners in common in equal shares in accordance with Section 91(2) of the *Land Registration Act*.
 19. When the Appellant applied for confirmation of the grant of letters of administration in respect of the late Jediel Nyaga Nkanata in Nanyuki HC Succession Cause No. 33 of 2015, he did not disclose that the late Jediel Nyaga Nkanata owned the property described as Naromoru Block 1/(Ragati) /867 with Julius Kaaria Ikiara as is evident from the Amended Certificate of Confirmation of grant issued on 19/9/2017 where it is indicated that that parcel of land is to be shared equally by the Appellant and Doreen Kainyu Nkanata.
 20. The Appellant contends in this appeal that the suit property formed part of the Estate of his late father based on the confirmation of grant issued in the succession cause. That is not the correct legal position because his late father co-owned the land with Julius Ikiara. Ownership of land is not conferred by succession proceedings as the Appellant argued. Whether or not a grant has been confirmed, it may be revoked or annulled by the court if it was obtained by the making of false statement or concealment from the court of something material to the case pursuant to Section 76 of the *Law of Succession Act*.
 21. Under Section 79 of the *Law of Succession Act*, the property of a deceased vests in the personal representative, that is, the executor or administrator to whom representation has been granted. All the property of a deceased person vests in the personal representative unless the grant imposes limitations. There is no evidence to show that the Respondent obtained grant of letters of administration to the estate of the late Julius Kaaria Ikiara. Under Section 82 of the Act, it is a personal representative that is empowered to enforce by suit causes of action which by law survive the deceased and to deal with the assets vested in them in accordance with the provisions of that section.
 22. In this court's view, the Respondent's recourse lies in first taking out letters of administration to the estate of the late Julius Kaaria Ikiara and then applying for revocation of the grant issued to the Appellant with regard to the suit property which the late Julius Kaaria Ikiara owned with the Appellant's late father. Once a legal representative of the estate of the late Julius Kaaria Ikiara has been appointed and the grant issued to the Appellant is amended to specify that the beneficiaries of estate of the late Jediel Nkanata are only entitled to half share in the suit property, the beneficiaries of the estates of both the late Jediel Nkanata and the late Julius Ikiara can take steps to subdivide the suit property if that is feasible, or have the suit property sold and the proceeds shared out equally between the beneficiaries of the estates of the late Jediel Nkanata and the late Julius Ikiara. The beneficiaries of the two estates will be at liberty to buy out the other set of beneficiaries as may be agreed upon.
 23. In the interest of justice, the rent derived from the suit property will be collected and deposited in an interest earning account to be opened in the joint names of the advocates for the Appellant and the Respondent within 14 days of the date of this judgment pending amendment of the certificate of confirmation of the grant relating to the Estate of the late Jediel Nkanata and appointment of the administrators for the estate of the late Julius Kaaria Ikiara.
 24. As the appeal has partially succeeded, each party will bear its own costs of the appeal and of the suit.

Delivered virtually at Nairobi this 7th day of December 2023.

K. BOR



JUDGE

In the presence of: -

Mr. William Bwonwonga for the Appellant

Mr. Joseph Kaimenyi for the Respondent

