



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 175 OF 2019**

**DIANA MUCHIRI.....PLAINTIFF**

**VERSUS**

**LYDIA WARIARA NJENGA.....1<sup>ST</sup> DEFENDANT**

**MARIA WANJIRA NJENGA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit on 23<sup>rd</sup> May 2019 through a plaint of the same date. The plaint was subsequently amended on 10<sup>th</sup> March 2021 and further amended on 10<sup>th</sup> June 2021. In the further amended plaint, the Plaintiff sought the following reliefs against the defendants;

- a) A declaration that all that property known as Nairobi /Block 111/1799 together with the improvements thereon (hereinafter referred to as “the suit property”) belongs to the Plaintiff.
- b) An order directing the Defendants to give up vacant possession of the suit property to the Plaintiff, and in default, the court do issue an order for forceful eviction of the Defendants from the suit property.
- c) The Officer Commanding Station Kayole Police Station do ensure compliance with order (b) above.
- d) A permanent injunction restraining the Defendants, by themselves, their assigns, agents, servants, employees or anyone claiming under them, howsoever from entering, re-entering and/or remaining upon the suit property.
- e) Damages for trespass.
- f) Costs of this suit.

2. The Plaintiff averred that the suit property was registered in her name and the name of her late husband Peter Njenga Kimani (hereinafter referred to only as “the deceased”) as joint tenants and that they occupied the main house on the suit property as their matrimonial home while the detached servant quarter (DSQ) was let to tenants.

3. The Plaintiff averred that sometime in 2015, the Defendants unlawfully trespassed onto, encroached and forcefully evicted the Plaintiff from the suit property and moved into the main house and let out the DSQ to a tenant on the basis that the suit property formed part of the estate of the late Peter Njenga Kimani (the deceased) and that they were taking over the suit property in accordance with Law of Succession. The Plaintiff averred that the suit property did not form part of the estate of the deceased and that she was the lawful proprietor thereof by virtue of the doctrine of survivorship.

4. The Defendants were served with Summons to Enter Appearance but did not defend the suit. At the hearing of the suit, the Plaintiff adopted her witness statement filed together with the amended plaint as part of her evidence in chief and produced the documents attached to her list of documents dated 23<sup>rd</sup> May 2019 as Plaintiff’s Exhibit 1. In the statement, the Plaintiff stated that she was the registered proprietor of the suit property. The Plaintiff stated that the suit property was registered in her name and the name of the deceased as joint tenants. The Plaintiff stated that in 2015, the Defendants forcefully evicted her from the suit property claiming that the property formed part of the estate of the deceased.

5. The Plaintiff stated that upon the death of the deceased, she became the sole proprietor of the suit property under the doctrine of survivorship. The Plaintiff stated that the Defendants should be ordered to vacate the suit property and to pay damages for trespass since they have been deriving commercial benefit from the suit property. In her oral evidence in court, the Plaintiff stated that the Defendants were receiving rent from the suit property. She stated that the suit property could attract rent of Kshs. 30,000/- per month.

6. On examination by the court, the Plaintiff stated that the 1<sup>st</sup> Defendant was a daughter to the deceased while the 2<sup>nd</sup> Defendant was the deceased's first wife and the mother to the 1<sup>st</sup> Defendant. The Plaintiff told the court that she was the deceased's third wife. The Plaintiff stated further that she occupied the suit property as her matrimonial home from 1990 and that she lost her eyesight in 2001. She stated that she was not born blind and that she left the suit property in 2001 to seek medical treatment and that the Defendants took advantage of her absence and occupied the suit property.

7. The Plaintiff stated that the Defendants never came to the suit property while she was in occupation. She stated that she was not aware whether the Defendants or anyone else had applied for a grant in respect of the estate of the deceased.

8. After the close of the Plaintiff's case, the Plaintiff's advocate submitted that pursuant to section 91(4)(b) of the Land Registration Act, 2012, the suit property is now solely owned by the Plaintiff. The Plaintiff submitted that the 1<sup>st</sup> Defendant who mostly occupies the suit property is a trespasser thereon. The Plaintiff urged the court to assess general damages for trespass.

Determination:

9. From the pleadings three issues arise for determination in this suit namely; whether the plaintiff is the sole proprietor of the suit property, whether the Defendants are trespassers on the property and whether the Plaintiff is entitled to the reliefs sought in her amended plaint.

10. The suit property was registered under the Registered Land Act, Chapter 300, Laws of Kenya (now repealed) (RLA). It was registered in the names of the Plaintiff and the deceased as joint tenants. Registration of land in the names of more than one person was provided for in sections 101, 102 and 103 of the RLA the relevant provisions of which state 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. ...”**

11. Section 118 of the RLA provides that:

**“If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.”**

12. The RLA was repealed by the Land Registration Act, 2012 which has similar provisions in sections 91, which states as follows in subsection (4):

**“If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently –**

**(a) a dispositions may be made only by all the joint tenants;**

**(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or**

**(c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”**

13. The distinction between joint tenancy and tenancy in common was made in Isabel Chelangat v Samuel Tiro Rotich & 5 others (2012) eKLR, as follows:

**“At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts, Megary & Wade, The Law of Real Property 6<sup>th</sup> Edition and Cheshire & Burn's, Modern Law of Real Property, 16<sup>th</sup> Edition. According to Burn, at P242 “...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...” Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”**

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. The four unities that must be present in a joint tenancy are

(i) The unity of possession.

(ii) The unity of interest.

(iii) The unity of title.

(iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. (P477) One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. 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 is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

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.

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.”

14. In Re Estate of Dorica Lumire Mapesa (Deceased) [2018] eKLR the court stated as follows on the same issue:

“20. Having concluded that East/Wanga/Lubinu/66 was held by the deceased and Silas Okumu Simeyo as joint proprietors, it follows then that following her demise on 6th February 1994, the principle of jus accrescendi applied, and her interest in the said property merged or united with that of the surviving joint tenant or joint proprietor, Silas Okumu Simeyo. The effect of this then would be that the said property ceased to form part of the estate of the deceased and was not available for distribution in her estate. Indeed, by virtue of section 118 of the Registered Land Act, Silas Okumu Simeyo, did not even need to initiate a succession cause to have the property transferred to his name, all he should have done was provide proof of the death of the joint tenant to the Land Registrar for him to act as envisaged by that provision.”

15. In Re Estate of Johnson Njogu Gichohi (Deceased) [2018] eKLR, the court stated that:

“By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. W. M. Musyoka in his book Laws of Succession at page 3 states as follows: -

“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”

16. The Certificate of Official Search dated 5<sup>th</sup> October 2021 that was submitted to court by the Plaintiff at the request of the court shows that the suit property was registered in the names of the Plaintiff and the deceased as joint tenants on 26<sup>th</sup> February 1991. It follows therefore that upon the death of the deceased, the Plaintiff became the sole owner of the suit property through the doctrine of survivorship which is recognized under the provisions of the RLA and Land Registration Act, 2012 that I have referred to earlier. It is my finding therefore that the Plaintiff is the sole proprietor of the suit property.

17. On the second issue, trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I have made a finding that the Plaintiff is the sole proprietor of the suit property. It follows therefore that the Plaintiff was at all material times entitled to quiet enjoyment of the suit property. Once the Plaintiff established that she is the lawful proprietor of the suit property, the burden of proof shifted to the Defendants to justify their entry and occupation of the suit property. As I mentioned earlier in the judgment, the suit was not defended which means that the Defendants did not give any justification for their entry and continuous occupation of the suit property. In the absence of any justification for the Defendants’

occupation of the suit property, it is my finding that they are trespassers on the suit property.

18. On the last issue, I am satisfied from what I have stated above that the Plaintiff has proved her case against the Defendants and as such she is entitled to the reliefs sought in her further amended plaint. In addition to the declaration, vacant possession and a permanent injunction, the Plaintiff also sought damages for trespass. In Park Towers Ltd. v John Mithamo Njika and 7 Others 2014 eKLR the court stated as follows:

**“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”**

19. In Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 45 para 26 1503 the authors have stated as follows on computation of damages:

- a) **If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.**
- b) **If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.**
- c) **Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.**
- d) **Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.**
- e) **If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased”**

20. From the evidence on record, I am satisfied that the Plaintiff is entitled to damages for trespass. The Plaintiff led evidence that the suit property would be rented out in the open market at Kshs. 30,000/- per month. I will award the Plaintiff mesne profits at the rate of Kshs. 30,000/- per month from 1<sup>st</sup> June 2019 until possession of the property is delivered to the Plaintiff.

Conclusion:

21. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants jointly and severally as follows;

- a. I declare that the Plaintiff is the sole proprietor of all that parcel of land known as L. R No. Nairobi/ Block 111/1799 together with the improvements thereon (the suit property).
- b. The Defendants shall vacate and hand over possession of the suit property to the Plaintiff within thirty (30) days from the date of being served with a copy of the decree extracted from this judgment in default of which the Plaintiff shall be at liberty to apply for warrants for their forceful eviction from the property.
- c. A permanent injunction is issued restraining the Defendants by themselves or through their assigns, agents, servants, employees or any one claiming under them howsoever from re-entering and/or re-occupying the suit property once they vacate or are evicted therefrom.
- d. The Defendants shall pay to the Plaintiff Kshs. 30,000/- per month as mesne profits or general damages for trespass from 1<sup>st</sup> June 2019 until vacant possession of the suit property is delivered to the Plaintiff.
- e. The Plaintiff shall have the costs of the suit.

**DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF JANUARY 2022**

**S. OKONG’O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Gichigo for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi - Court Assistant