



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shah & another v Haria & another (Environment and Land Case Civil Suit E340 of 2021) [2022] KEELC 2226 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2226 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E340 OF 2021  
MD MWANGI, J  
JUNE 16, 2022  
IN THE MATTER OF THE LAND ACT, 2012 AND THE LAND  
REGISTRATION ACT**

**BETWEEN**

**JITENDRAKUMAR L. SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**RAJNIKANT L. SHAH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DHANLAXMI A.K. HARIA ..... 1<sup>ST</sup> DEFENDANT**

**PARINA A.K. HARIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

(In respect of Originating Summons dated 1st September, 2021 seeking for an order that the suit property that is jointly owned by the parties as tenants in common be sold and the net proceeds shared equally between the parties)

**Background**

1. The Plaintiffs instituted this suit vide an Originating Summons dated the 1st September, 2021 seeking orders: -
  - a. That the Honourable court be pleased to order that the property known as LR No. 209/2237 (IR108458) jointly owned by the parties herein as tenants in common be sold and that the net proceeds shared equally among both parties.
  - b. That in the alternative and as the first option to (1) above either of the parties (Plaintiffs and defendants) be at liberty to buy off the others share with the purchase price being agreed upon



by both parties and in default based on a valuation report by a valuer agreed upon by both parties.

- c. That the costs of this originating summons be provided for
  - d. That the Honourable court be at liberty to issue any other or further orders as it shall deem appropriate in the circumstances.
2. The Application is premised on the grounds set out in the supporting Affidavit of Jitendarakumar L. Shah deponed on the 1st September, 2021.

### **The Supporting Affidavit**

3. The deponent avers that the Plaintiffs and the Defendants are the joint owners as tenants in common of the suit property herein, L.R No. 209/2237 (I.R 108458) as per the attached copy of title marked as "J1". That the suit property is developed with an old building block is situated along Jaisala Road near Khoja Mosque within Nairobi City. That for economic and management reasons, the plaintiffs are interested in disposing and/or divesting themselves from the tenancy in common ownership of the suit property as it has become untenable and increasingly difficult to own the same as tenants in common.
4. The deponent further deposes that he understands that tenants in common are supposed to agree on the fate of the property they own in terms of severing it out if one party opts out. The options are to sub-divide the property, either of the two parties buying off the other based on a market forces-based valuation of the property or that the property be sold to a third party with the net proceeds thereof be shared between the parties.
5. The deponent states that they approached the Defendants on several occasions with a view to agreeing on one of the options but they have remained un-corporative and non-committal on the options suitable to them hence the basis of the proceedings before the court.
6. That in as much as it is their constitutional right to own property, it is also their right to dispose the same at will and such freedom should not be curtailed by the Defendants purely on account of tenancy in common ownership without any justifications and or reasonable grounds.
7. The deponent opines that the option of sub-division of the property is not available to the parties due to the size of the plot and the fact that it is developed hence they cannot share out the building to have separate titles. Consequently, the only viable option is to sell out the property or one party buying out the other.

### **Non-response by the Defendants**

8. The Defendants were duly served on the 22<sup>nd</sup> October, 2021. There is a Return of Service by Patrick Kinyua deponed on the 29<sup>th</sup> October, 2021. Despite service, the Defendants did not file any response nor entered appearance in this matter. The matter proceeded as an undefended suit.

### **Court's Direction**

9. The Court in compliance with Order 37 of the *Civil Procedure Rules*, directed that the Originating Summons be dispensed with by affidavit evidence and written submissions. The Plaintiffs filed their submissions dated the 6<sup>th</sup> May, 2022 which the court has had the opportunity to peruse.

### **Plaintiffs' submissions**

10. In their submissions, the Plaintiffs reiterate the averments contained in the Originating Summons.



They submit that they are keen on terminating the tenancy in common on account of economic and management reasons. They reiterate the three options of severing the common tenancy ownership.

11. It is the Plaintiffs case that the option of sub-division of the property is not available to the parties herein due to the size of the plot and the fact that it's developed. They cannot therefore share out the building and have separate titles. Thus, the only viable option is the sale of the property to a third party or one party buying out the other.
12. The Plaintiffs further submit that under Section 96 (b) of the *Land Registration Act*, the court may make an order for sale of such a property. They cite the case of *Muburi Muchiri vs Hannah Nyamunya (Sued as the Administrator of the Estate of Njenga Muchiri also known as Samuel Njenga Muchiri (Deceased)* (2015) eKLR and *Michael Munene Njogu & 2 Others vs Bernard Githinji & 2 Others* (2015) eKLR.

### **Issues for Determination**

13. Having considered the Originating Summons, the Supporting Affidavit and the Submissions by the plaintiffs herein, the issue for determination in this Court's opinion is whether the Plaintiffs are entitled to the orders sought.

### **Analysis and Determination**

14. Tenancy in common and joint tenancy are two sister concepts. The distinction between the two concepts was stated by Sir Robert Megarry and Sir William Wade in their work entitled *The Law of Real Property*; Sweet & Maxwell, Eighth Edition Pages 496 to 503.

They stated that;

“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”.....

.....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.”

15. The four unities of a joint tenancy are the unities of possession, interest, title and time. The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another.



16. It is evident from the Certificate of title produced herein that the original proprietors were tenants in commons. Section 61 of the [Land Registration Act](#), 2012 provides for the procedure for dealing with a tenancy in common where the proprietor has died. It provides that the personal representative(s) is entitled to be registered by transmission as proprietor in the place of the deceased, and further, that such registration relates back to and takes effect from the date of the death of the proprietor. As was the case in the instant suit.
17. The Plaintiffs wish to terminate the tenancy in common with the Defendants on the basis of economic and management reasons. As stated in the Supporting Affidavit, it is their Constitutional right under Article 40 to own and dispose of their property as they wish. They have therefore sought for severing of the co-tenancy.
18. Section 94 of the [Land Registration Act](#) provides for a severance of a common tenancy by way of partition. It provides that:
  1. 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 a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.
  2. An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—
    - (a) any one or more of the tenants in common without the consent of all the tenants in common; or
    - (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.
19. In the case of [Muburi Muchiri –vs- Hannab Nyamunya \(Sued as the Administrator of the Estate of Njenga Muchiri also Known as Samuel Njenga Muchiri \(Deceased\)\)](#) [2015] eKLR, the Court held that:-
 

“the law on termination of a tenancy allows co-owners to by agreement sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of the sale.”
20. Under Section 96 of the [Land Registration Act](#), if for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may -
  - (a) a) cause a valuation of the land and of the shares of the tenants in common to be undertaken; and
  - (b) order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or



- (c) make any other order to dispose of the application which the court considers fair and reasonable.”
21. My reading of the section 96(2) is that, before making an order for sale of the land, the court must make an enquiry to establish amongst other things: -
- a. The nature and the location of the land;
  - b. Whether it may be feasible to partition the land (instead of a sale) considering the provisions of the law regulating subdivision of land and any covenants and conditions applicable to the land in question;
  - c. The number of co-tenants (co-owners) and the extent of their respective shares;
  - d. The value of any contribution made by any of the co-tenant to the improvements on the land or towards the maintenance of the Land or buildings thereon;
  - e. Where the tenants in common are spouses or are dependants of or related to any of the tenant(s) in common; whether they have been or will be adequately provided for as a consequence of or after the partition is effected, to ensure they are not rendered homeless; and
  - f. Where the Applicant to the court is a Judgment debtor in execution of a decree; whether the interests of the spouse or dependants of the Judgment-creditor whose interest/share is to be sold will be adequately catered for and particularly that no spouse or dependant will not be rendered homeless.
22. It is evident that the subject property herein is not capable of being partitioned. This is so since the property is developed and it will therefore be possible for the parties to share the building and have distinct titles for the units. The only available option is for the property to be sold; either by one party buying out the other or sale to a third party and proceeds shared equally amongst the co-tenants. None of the parties herein are in occupation of the suit property – it is a commercial premises. No party is therefore at the risk of being rendered homeless.
23. The only practicable thing to do then is to have the property sold and the proceeds shared by the co-tenants. Accordingly, this court directs that the property known as LR No. 209/2237 (IR108458) jointly owned by the parties herein as tenants in common be sold upon valuation by a professional, duly registered Land valuer and that the net proceeds be shared equally between the co-tenants. Either of the parties will be at liberty to buy off the other’s share with the purchase price being the value set by the professional duly registered Land valuer.

## **Conclusion**

22. In conclusion, the Originating Summons dated 1<sup>st</sup> September, 2021 is hereby allowed in the following terms: -
- A. The property known as L.R No. 209/2237 (I.R 108458) jointly owned by the parties herein as tenants in common be sold upon valuation by a professional, duly registered land valuer and that the net proceeds shared equally between the co-tenants. Either of the parties is at liberty to buy off the other’s share with the purchase price being the value set by the professional duly registered Land valuer.
  - B. The costs of the Originating Summons are awarded to the Plaintiffs herein to be recovered from the proceeds of the sale.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2022**

**M.D MWANGI**

**JUDGE**

In the Virtual Presence of:-

Ms. Wachanga for the Plaintiffs

N/A for the Defendants

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**

