



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Civil Case 364 of 2005**

**FREDRICK KAGIO KINYUA.....1<sup>ST</sup> PLAINTIFF**

**NGUNYI KARURI.....2<sup>ND</sup> PLAINTIFF**

**PETER WARUI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**WEMBU WACHIRA.....1<sup>ST</sup> DEFENDANT**

**LUCY WAIRIMU WACHIRA.....2<sup>ND</sup> DEFENDANT**

**GATHONI WACHIRA.....3<sup>RD</sup> DEFENDANT**

**SUED AS ADMINISTRATOR OF THE ESTATE OF**

**WACHIRA KIMANTHI (DECEASED).....4<sup>TH</sup> DEFENDANT**

**RULING**

The Defendants herein have moved the court by way of a Notice of Motion dated 19<sup>th</sup> October 2005 brought under Orders VI Rule 13(1)(b)(c) and (d) and XXXV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. They pray for Orders that

1. The Defendants Defence filed on 28<sup>th</sup> July 2005 be struck out
2. Summary judgment be entered against the Defendants jointly and severally in terms of the plaint
3. Costs for the application be provided for

The application is founded on the grounds inter alia that

- i) The Defence is frivolous, vexatious and intended to delay the fair trial of the action and is otherwise an abuse of the process of court
- ii) The Plaintiffs together with Wachira Kimathi (on behalf of whose estate the Defendants are sued

as administrators) are tenants in common of the suit property in Equal shares.

The application and the above grounds is supported by the affidavit of the 1<sup>st</sup> Plaintiff to which he annexes a copy of the Title to the property to demonstrate the ownership as tenant in common and in Equal shares and also depones to the fact that the Defendants in their defence, are not opposed to the dissolution of the joint tenancy and the sale of the property and the sharing out of the proceeds of sale. The applicants contend that the distribution of the proceeds otherwise than in equal shares as sought by the Defendants is not tenable. The applicants contend that there are no triable issues to warrant the suit proceeding to trial.

I have seen the Defence challenged herein and do confirm that although not disputing ownership the same denies that the ownership is in equal shares. It goes to state that each of the parties named therein is entitled to a percentage of proceeds equal to his contribution towards the purchase price. It also introduces a 6<sup>th</sup> person, Mutahi Gathangara. They have not sought that this additional person be made party to this suit. The prayers in the Defence is full of meaning. The same reads as follows:

“REASONS wherefore the Defendants pray for the joint ownership of the property or partnership be dissolved, the property be sold by public auction or private treaty and the proceeds be shared according to contribution and the Plaintiffs be ordered to pay costs of this suit.”

The same plea is introduced in the Replying Affidavit filed in response to the Plaintiffs’ application. From the submissions by counsel as well as the pleadings and supporting documentation the following facts are clear.

1. The joint ownership of the suit premises (L.R. NO. 209/2496 Nairobi)
2. The death of one tenant in Common is also not in dispute
3. There is common agreement that the joint tenancy of the suit premises herein be dissolved
4. The parties agree to the sale of the joint property and distribution of the proceeds

The only issues not agree are

- i) The mode of distribution of the proceeds of sale of L.R No. 209/2496 Nairobi
- ii) The existence of a 6<sup>th</sup> proprietor Mutahi Gathangara

The Defendants having agreed in their defence to the two main prayers set out in the Plaint namely that the tenancy in Common in L.R No 209/2496 Nairobi be dissolved and that the property be sold, and the proceeds be distributed among them, I am unable to see what triable issues can be said to arise from their defence merely because they feel that the distribution of the proceeds ought to be done otherwise than in equal shares. The parties interest in the suit premises is clearly set out in the document of Title itself which spells out that on 6<sup>th</sup> January 1964 the suit premises were transferred to

**“...Wachira Kimathi, Fredrick Kigio Kinyua, Kimathi Waigera, Nguunyu Kainiri and Peter Warui as tenants in common in equal shares..”**

The law is that tenants in common hold undivided and indivisible shares in the property in respect of which they are registered as such. The shareholding and distribution of sale proceeds cannot therefore be in any other proportion than in equal shares. The law being thus clear, it follows that the Defence filed herein does not constitute a reasonable defence or any defence at all to warrant the matter going to trial. In light of the foregoing, I do not consider the Defendants serious about the existence of another tenant in common or the various contributions allegedly made towards the purchase of the property. Had they been serious, one would expect that they would have put in a counter claim for counter declarations to be made

in regard to the issues introduced over and above their various admissions. In summary therefore, I find that clearly the Defence does not raise any triable issues; is frivolous and an abuse of the process of court. Consequently, I allow the application, strike out the Defence and do enter judgment for the Plaintiff/Applicants as prayed in the Amended plaint.

The Plaintiff/Applicants shall have the costs of this application.

Dated and delivered at Nairobi this 7<sup>th</sup> day of July 2006

**M. G. MUGO**

JUDGE

Delivered in the presence of

Ndungu for the Applicant

Njoroge Mwate holding brief for Wandaka for Respondent