



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 131 OF 1996

DAVID NJOROGI KIMANI & ANOTHER APPELLANTS

VERSUS

JAMES MUKUHA NJAURESPONDENT

JUDGMENT

This is an appeal against the judgment of the Principal Magistrate at Kiambu, where the magistrate granted orders evicting the appellants from a parcel of land the subject-matter of the suit there and perpetually restrained the defendants from interfering with the said parcel of land; but she dismissed a claim for mesne profits.

The appellants in this appeal complain that the trial court should have appreciated that as the land was owned in common it could only be sold with the consent of all the proprietors; that there was no partitioning of the said land in accordance with the law; and that eviction should not have been ordered before the Court was satisfied as to the boundary. A point had been taken with regard to the consent of the relevant Land Control Board to the transaction of sale, but it was agreed by counsel at the hearing of the appeal, and it is no longer an issue.

In the trial court it was found as a fact, that two brothers and a sister, jointly owned a piece of land. One of the brothers was entitled to one third in the share of that land (which was registered under one title). He decided to sell his one third share in the said land, leaving the other brother's and the sister's shares for them. His share was sold to the respondent in this appeal. He then died.

The surviving brother and sister then refused to recognize that sale. The respondent took them to court to remove them from the portion of the land he bought. The former single title had been sub-divided and the portion sold had received its own separate title registered in the name of the respondent. The shares of the surviving brother and sister (the appellants herein) remained intact, in their names under a separate title.

The brother's and sister's objection to the sale by their deceased brother of his one-third share to the respondent herein was based on the ground that their brother (since deceased) sold his portion of the land to the respondent, without their consent to the sale. On that ground alone, the appellants continued using the piece of land which their late brother had sold to the respondent. The respondent felt aggrieved by this action and stance taken by the appellants, and when they refused or failed to desist, he took them to the Court to have them evicted from that portion of the land sold and now registered in his name in a separate title.

The trial court found for the respondent and granted the order sought. That is what aggrieved the

appellants and prompted them to come to this court, complaining against the decision of the trial court in the manner I have already specified at the beginning of this judgment. So, the issue on this appeal is whether the appellants are right to complain on the ground that the sale by their late brother of his share of the land held by the three co-owners without their knowledge or consent, and what effect their refusal to recognize the respondent's claim has on the respondent's title and right to the land.

In the eyes of the law the refusal of the appellants as co-owners in the sense of joint owners which they were found to have been with their late brother, to recognize the sale and transfer of their late brother's share of the land jointly owned, without their consent or knowledge has no legal consequence on the title of the respondent as purchaser of their late brother's interest in the land.

Normally, during the continuance of a joint ownership a co-owner holds nothing separately from his fellows; but there is a general rule which may be expressed as *alienatio rei praefertur juri accrescendi*, which, in English, means that alienation of property is favoured by the law rather than accumulation. It is a general rule commonly used in connection with the right of survivorship between joint tenants, which right is defeated by a disposition of his share by one of the joint tenants during the life of the other. Since according to this doctrine the law favours the alienation rather than the accumulation of property, one joint tenant can alienate his share to a stranger.

The effect of such an alienation, whether by way of sale or mortgage or assignment or howsoever, is to convert the joint tenancy into a tenancy in common, because the alienee and the remaining tenant or tenants hold by virtue of different titles and not under the one common title which is essential to the existence of a joint tenancy or ownership: see Buckley, LJ, in *Cedar Holdings Ltd v Green and another*, [1981] Ch 129, at p 138. Clearly, a severance of a joint tenancy or ownership occurs upon assignment, settlement, charge or sale, of one's interest, and also upon a measure taken to prevent unjust enrichment.

Similarly, a determination of a tenancy in common may be by (a) partition, (b) sale, or (c) acquisition by one tenant or co-owner of shares vested in his co-tenants or co-owners.

In both cases of co-ownership, if one of the co-owners disposes of his interest in the property so owned or held, the sale, conveyance, mortgage, assignment, or other disposal is only to the extent of his fractional interest, and it is limited to the extent of the share of the co-owner who is divesting himself of his interest in the property.

As between co-owners as such, there is no fiduciary relationship: hence, one co-owner can dispose of his interest, and he is not liable to account to his co-owners, provided that he does nothing prejudicial to the other coowner's interest or provided that he is not in breach of legitimate covenants.

In normal circumstances, a purchaser, or assignee, or such other person to whom the co-owner sells or assigns or otherwise transfers his share in the property, is not concerned to see or inquire whether the other coowner or co-owners, has or have given their prior consent to the transaction: he is concerned only with consents which are, by law, made requisite to the transaction. Such a purchaser will be prejudiced only where he has been in collusion with the selling co-owner in committing a fraud, illegality, or other wrong which the law will not countenance.

These principles are so elementary that I have not seen it necessary to cite authorities for their proposition.

Applying these principles to the facts of this case, I find that the deceased brother of the appellants, while he lived, properly sold his share of the land, and did not thereby prejudice the interests of his co-owners. The appellants testified that each of the co-owners was entitled to one-third of the land. There was a clear sale of his one-third to the respondent by the deceased brother. A title was issued to the respondent for the one-third sold to him. There was neither fraud nor collusion to the prejudice of the appellants. The consent of the relevant Land Control Board required by law was obtained for the sale transaction, and this fact was conceded.

The consent of the appellants as co-owners was not a requisite one; and it did not have to be sought and obtained by the selling co-owner.

Taking everything as a whole, the trial court was right in its findings of fact, in its understanding of the applicable law and legal principles and their application to the facts before the Court, and in its decision and reasoning for that decision. The appeal does not have valid grounds. It is dismissed.

As the case is one of neighbours, I consider that in the special circumstances of this one particular case, each party shall bear its own costs. It is so ordered.

Dated and delivered at Nairobi this 3rd day of April, 2003

R.C.N. KULOBA

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JUDGE