



Raghwani & 2 others v Kerai (Legal Representative of the Estate of Kanji Mavji Kerai) (Environment & Land Case E042 of 2021) [2023] KEELC 623 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E042 OF 2021
EK WABWOTO, J
FEBRUARY 9, 2023**

BETWEEN

**DHANJI LAXMANBHAI BHIMJI RAGHWANI 1ST APPLICANT
MANJI KANJI RAGHWANI 2ND APPLICANT
VIRJI KANJI RAGHWANI 3RD APPLICANT**

AND

DEVJI KANJI MAVJI KERAI (LEGAL REPRESENTATIVE OF THE ESTATE OF KANJI MAVJI KERAI) RESPONDENT

JUDGMENT

1. This matter was commenced *vide* Originating Summons dated 14th September 2021 stated to be brought pursuant to the provisions of Order 37, Rules 38 of the [Civil Procedure Rules](#) (Cap 21, Laws of Kenya) and Section 96 (1) the [Land Act](#) of 2012 and Section 3A of the [Civil Procedure Act](#) wherein the Applicants sought the following reliefs;
 - a. The Honourable Court be pleased to cause a valuation of all that piece of and known s L.R No. 209/4593/2 and of the shares of the tenants in common by a way of registered land valuer in Kenya to be appointed by the applicant and the same be filed in court for consideration.
 - b. The Honourable Court be pleased to grant an order for sale and disposal of one quarter (25%) of the undivided share held by the respondent as legal representative to the estate of Kanji Mavji Kerai in that parcel of land known as L.R No. 209/4593/2 to the applicants herein on first priority.
 - c. The Honourable Court be pleased to grant an order that costs of valuation and any other incidental costs arising out of the process be catered for from the accumulated rentals of the one



quarter (25%) undivided share belonging to the respondent as legal representative to the estate of Kanji Mavji Kerai in that parcel of land known as LR No. 209/4593/2.

- d. That the Honourable Court be pleased to direct and compel the respondent to execute the transfer documents and all other necessary and requisite steps necessary for successful transfer of the property and failure to which the Deputy Registrar of this Court be authorized and empowered to do so.
 - e. The Honourable Court be pleased to order an account of the balance of the accrued rentals together with the purchase price out of the sale of one quarter (25%) undivided share by the respondent as legal representative to the estate of Kanji Mavji Kerai in that parcel of land known as LR NO. 209/4593/2 and the same be deposited in Court upon completion.
 - f. The Court makes any other order that it finds just and probable in the circumstances.
 - g. That the costs of this Application be borne by the Respondent and be deducted out of the balance of the purchase price recovered from the sale of one quarter (25%) undivided share by the respondent as legal representative to the estate of Kanji Mavji Kerai in that parcel of land known as LR No. 209/4593/2.
2. The Originating Summons was supported by the affidavit of the 1st Plaintiff sworn on 14th September 2022 on the grounds appearing on the face of the Summons. The summons was opposed by the Respondent through an affidavit sworn on 22nd October 2021.
 3. It was the Applicants case that together with Kanji Mavji Kerai (deceased) they were tenants in common in equal undivided share of all piece of land situate in Nairobi known as LR No. 209/4593/2 measuring 0.1847 of a hectare or thereabouts with the dimensions abuttals and boundaries thereof is delineated on Land Survey Plan Number 223930 annexed to Grant No. IR 82985 and registered as Number I.R 82985/1 on 18th February 2000 and deposited in the Survey Records Office at Nairobi aforesaid and thereon bordered red together with improvements and other developments erected thereon (here and after 'property')
 4. It was also the Applicants case that in the course of the year and by virtue of legitimate assent, transfers and conveyances the Applicants herein became the legitimate and beneficial owners of the remaining three quarter (75%) undivided share of the property. The deceased left the Respondent Devji Kanji Mavji Kerai, as the sole executor of his estate which includes one quarter share in LR No. 209/4593/2.
 5. It was also averred that prior to falling out, the Applicants were business partners with the deceased and had ventured into commercial dealings including investments in real estate spanning from early 1980s to the late 2000s. It was further averred that in the course of their numerous business ventures the deceased fell out with the rest of the partners and separated himself from all the ongoing business. He declined involvement in management of the property and ultimately declined to voluntary give consent to any decisions made thereafter.
 6. It was also contended that the Applicants have on their own been collecting rental income on their behalf and on behalf of the Respondent over the years to date.
 7. It was further contended that upon the demise of the deceased, the Applicants made several attempts to have the Respondent involved in the management of the property going to the extend of sending several cheques to him on account of rentals from the one quarter (25%) undivided share, the said cheques have been rejected and returned back. The Applicants contended that the current accumulated rent plus interest in favour of the Respondent is now approximately over Ksh 10,450,560/- and still growing.



8. The Applicants further contended that efforts to manage the property and make comprehensive decisions have continued to be frustrated and are unable to further develop the property and make any tangible decisions on the property without cooperation from the Defendant.
9. The Court was also informed that the efforts to reach out to the Respondent to acquire the one quarter (25%) undivided share of his stake in the property have been futile and hence the need for the Court's intervention by granting the reliefs sought.
10. In his replying affidavit sworn on 22nd October 2021, the Respondent opposed the summons and denied the fact that the deceased fell out with the Applicants and declined to give any consent to any of the decisions made.
11. It was the Respondent's case, that prior to the demise of the deceased he had informed him that he had acquired some interest in some property with the 1st Plaintiff in Parklands and that the deceased had declined to receive rent as the said proportion of the ownership did not represent his actual investment since he was entitled to more.
12. The Respondent also averred that he was aware that this late father had contended that he had acquired ownership in two properties after co-investing with the Mr. Raghwani, in Gloucester House on Moi Avenue and VW FLATS on Ngong Road which properties were sold but no accounts provided to him after which he was included in the ownership of the subject property.
13. It was also deposed that the 1st Applicant and the deceased worshiped in the same temple and an attempt to mediate the grievances presented by the deceased by 10 eminent persons from the temple did not bear fruit and the decision by the deceased to decline the collected rental income was on principle as he felt the returns did not present a true representation of the value that he had invested in with his ventures and with Mr. Raghwani.
14. It was also averred that no such consent of any kind was requested and declined.
15. The Respondent also contended that the deceased had requested that his interest in LR No. 209/4593/2 should not be sold the same being part of their heritage and that as a beneficiary he is willing to acquire the interest of the other co-owners through purchase once the price is agreed upon.
16. It was contended that the Applicants have been less than candid in their averments since they had declared the value as Ksh 20,000,000/- and later when he declared his interest to purchase, it was raised to Ksh 30,000,000/-.
17. The Respondent further contended that he had requested for accounts on the rents received of Ksh 10,450,560/- but none had been provided.
18. The Applicants in their submissions dated 13th September 2022 outlined two issues for determination by the Court;
 - i. Whether the Applicants are entitled to the reliefs sought;
 - ii. Who should bear the costs of the application.
19. Relying on Section 96 (1) of the *Land Registration Act* No. 3 of 2012, it was submitted that the court has discretion to make such orders for the valuation and the sale of land held in common either by public auction or other means.
20. It was also submitted that pursuant to Section 96 (3) of the said Act, a tenant in common is entitled to purchase the land or nay share if it that is offered for sale, either at an auction or by private sale. Counsel



- added that circumstances have arisen in respect of the subject property that renders co-tenancy with the Respondent untenable, and that the subject property should be partitioned so that the interest of the Respondent out of the subject property be sold.
21. The Applicants argued that from the affidavits filed it is apparent that the Respondent has voluntarily failed to participate in the management of the property and also withheld the necessary consent requisite for further development.
 22. On the claim by the Respondent that his late father intentionally declined to take part in the management of the property and collect rent because of past differences in other ventures, the Applicants submitted that the same was an admission on the part of the Applicants claim for the following reasons;
 - i. No evidence was adduced by the Respondent to show that the past business ventures claimed in his affidavit and correspondences are connected to this particular property.
 - ii. It proves the Applicants claim that the actions by the Respondent are intentional and meant to sabotage the interests of the Applicants.
 - iii. The Defendant's aversions are self-defeating for the reasons that he confirmed that the deceased declined to receive rent and be involved in decision making,
 - iv. Despite denying not declining to give consent, he has declined to give a way forward.
 23. On the issue of costs of the summons, the Applicants submitted that the same should be allowed in their favour since the Applicants made efforts in trying to resolve the matter amicable before moving to court.
 24. The Respondent filed written submissions dated 22nd November 2022. The submissions reiterated the contents of the replying affidavit sworn on 22nd October 2021. It was submitted that no proof was provided to the effect that the Respondent had declined to give the requisite consents. Counsel also added that pursuant to Section 96 of the *Land Registration Act*, he has made an offer to purchase the interest of the co-tenant in common and he should be given first priority. Reliance was made to the case of Kerugoya ELC NO. 151 of 2013 *Michael Munene Njogu & Others v Bernard Githinji & Others*.
 25. From the pleadings filed, rival affidavits and written submissions, the issue that arises for this court's determination is whether or not the Applicants have made out a case warranting the grant of the reliefs sought.
 26. Section 96 of the *Land Registration Act* No. 3 of 2012 Sale of co-owned land.
 - (1) 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) 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.
- (2) The court shall, in exercising its powers under paragraphs (b) and (c), have regard to any of the matters set out in section 94 (3) (a) to (f) that may be relevant in the circumstances.
 - (3) A tenant in common shall be entitled to purchase the land or any share of it that is offered for sale, either at an auction or at any time by private sale.”

26. In Megarry & Wade, *The Law of Real Property*, 17th Edition at pages 493 and 494 paragraphs 13-009 to 13-012, the authors have stated as follows regarding the nature of a tenancy in common:

- “1. The tenants hold in undivided shares. Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.
- 2. There is no right of survivorship. The size of each tenant’s share is fixed once and for all and is not affected by the death of one of his companions. When a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes...
- 3. Only the unity of possession is essential. Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is the unity of possession. In particular, it should be noted that the unity of interest may be absent and the tenants may hold unequal interests, so that one tenant in common may be entitled to a one –fifth share and the other to four-fifths, or one may be entitled for life and another in fee simple”.

27. In the case of *Kursbed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated that:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. *Black’s Law Dictionary*, 9th Edn and Thomas F. Bergin & Paul G. Haskell, ‘*Preface to Estates in Land and Future interests* 54 2nd Edn, 1984”).

28. In the instant case, having perused the affidavits of the parties it is evident and further it is not disputed that the Applicants and the deceased fell out in the management of the property held in common and the same extended to the Respondent. It was also not disputed that both parties have amicably tried to resolve the issues but no progress has been made. The Respondent has admitted even declining to receive proceeds from rental income from the deceased one quarter (25%) undivided share.



29. I am of the view that, in a tenancy in common relationship, where co-owners cannot agree on how to occupy and use the property held in common and cannot also agree to partition the property, the only option left to them to resolve the stalemate is to sell the property and share the proceeds in which case priority can be given to co-owners who may wish to buy out the others to do so before the sale. This is an order that the court can make in exercise of its inherent power to bring this long-standing dispute to a close. The Applicants sought for the said orders and also the Respondent deposed at paragraph 10 of his replying affidavit that he is also willing to purchase once a price is agreed upon. However, this being a suit initiated by way of an Originating Summons the Respondent ought to have specifically sought for that relief by way of a counter affidavit and not in the manner deposed at paragraph 10 since a substantive relief sought by a party cannot be issued on the basis that it was solely deposed as an averment in an affidavit.
30. In view of the foregoing and being guided by the provisions of Section 96 of the Land Registration Act, it is the finding of this court that the Applicants have made out a case to warrant the grant of the reliefs sought.
31. On the issue of costs, looking at the circumstances of the case herein and considering the nature of the relationship of the parties, I will direct that each party bears own cost of the suit.
32. In conclusion, I find that the Applicants have made out a case for the grant of the reliefs sought and the court makes the following orders:-
- i. A valuation of the piece of land known as LR No 209/4593/2 and of the shares of the tenants in common shall be undertaken by a registered valuer appointed by the Chairman of the Institution of Surveyors of Kenya at the instance of the Applicants with notice to the Respondent.
 - ii. Following such valuation, an order is hereby issued for the sale and disposal of one quarter (25%) undivided share held by the Respondent as legal representative to the estate of Kanji Mavji Kerai in that parcel of land known LR No 209/4593/2 to the applicants herein on first priority.
 - iii. The parties shall co-operate fully with each other in the sale should it become necessary and shall make available, all documents in their possession which may be necessary to complete the transfer, failure of which the Deputy Registrar of this court shall be at liberty to execute any document or instrument that may be necessary to facilitate the sale and transfer of the one quarter (25%) undivided share held by the Respondent.
 - iv. The cost of the valuation and other incidentals to be met by the Applicants.
 - v. Either party shall be at liberty to apply to court but limited only to procedural issues or matters arising from the foregoing orders.
 - vi. Each party to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2023.

E.K. WABWOTO

JUDGE

In the presence of:



Mr. Ayieko for the Applicants.

Mr. Maina for the Respondent.

Court Assistants; Caroline Nafuna and Philomena Mwangi.

E.K. WABWOTO

JUDGE

