



REPUBLIC OF KENYA



KENYA LAW
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Gathumbi & 2 others (Suing as the legal representatives of the Estate of Gathumbi Komu (Deceased)) v Ndungi (Sued as the legal representative of the Estate of James Samuel Gichuru (Deceased); Masinde (The legal representative of the Estate of John Gitau Gichuru (Deceased) (Interested Party) (Environment & Land Petition 322 of 2018) [2023] KEELC 16084 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND PETITION 322 OF 2018**

AA OMOLLO, J

MARCH 2, 2023

BETWEEN

PETER NDUNGU GATHUMBI 1ST PLAINTIFF

PETER MUNGAI GATHUMBI 2ND PLAINTIFF

JAMES NJENGA GATHUMBI 3RD PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GATHUMBI KOMU (DECEASED)

AND

JOAN NJOKI NDUNGI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES SAMUEL GICHURU (DECEASED) DEFENDANT

AND

PERSIAH MUTHONI MASINDE (THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN GITAU GICHURU (DECEASED) INTERESTED PARTY

RULING

1. For determination is the Notice of Motion application dated March 31, 2022 and brought under the provisions of section A, IB and 3B of the *Civil Procedure Act* and Order 51 rule 1 of the Civil Procedure Rules. The defendant/applicant seeks the following orders-

1. Spent.



2. That pending the hearing and determination of this application, the Plaintiffs, their assigns, servants and/or agents be restrained from disposing, alienating, demolishing or in any way altering the structure of the suit property known as L.R No. 209/2412.
 3. that the Defendant/Applicant together with her representatives, servants and or agent be granted unlimited and unhindered access to the suit property.
 4. That this honourable court grants orders for partitioning of the suit property in accordance with the proposed plan by the Applicant annexed hereto and marked "A" and that the said partitioning be effected within 30 days of the making of this order.
 5. That an architect and/or engineer with the mandate to co-opt other professionals be engaged to effect the partitioning and the cost thereof be met by the plaintiffs and the defendant.
 6. That costs of this Application be provided for.
2. The notice of motion application is premised on the grounds listed on its face inter alia;
- i. That although the estate of James Gichuru co-owns the suit property, the Administratrix thereof has been excluded by the plaintiffs from the management of the suit property: The plaintiffs collect the rent; the plaintiffs identify prospective tenants, negotiate terms and draw leases without consulting the Administratrix; they deal with the building, make all the decisions concerning alterations and structural adjustments to the suit property without consulting the administratrix, and the plaintiffs deal with the suit property as if they are the sole owners thereof.
 - ii. That the defendant has been denied and continues to be denied access to the suit property despite her being an Administratrix of a deceased co-owner. She is thus unable to perform her duties as an Administratrix which include charging and receiving rent on behalf of the Estate of the deceased from the tenants occupying the suit property.
 - iii. That the defendant is apprehensive that the plaintiffs, without any reference to the defendant, intend to carry out demolitions and further structural changes that might have the effect of causing damage to the building, reducing its value and thus exposing the estate of the deceased to substantial loss.
 - iv. That the protracted stalemate between the plaintiffs and the defendant can only be resolved by severing the joint ownership of the suit property by clearly delineating, demarcating, and assigning equal parts of the suit property to be managed separately by each of the parties.
 - v. The partition sketch plan proposed by the defendant is quite reasonable as the two co-owners being the Estate of Gathumbi Komu and the Estate of James Samuel Gichuru will get equal shares of the property being 18 stalls each, with each having nine stalls on the ground floor and nine stalls on the upper floor. These stalls will be separated by a centralized steel staircase.
3. The application is further supported by the applicant's affidavit sworn on March 31, 2022. The defendant/applicant deposed that she has been excluded from the management of the suit property and physical access to the suit property despite being an administratrix of the deceased co-owner. That this has rendered her ineffective in performing her duties as an administratrix. She deposed further that the plaintiff/respondents intend to make substantial structural alterations to the suit property without her involvement. That the intended demolitions and rebuilding of certain section might have effects causing damage to the building thus exposing the estate of the deceased to substantial loss.



4. The applicant deposed that it is in the interest of justice and for good order that the property be urgently partitioned between the two co-owners since failure to do so will result in the deceased estate continuing to suffer loss. She urged that the proposed partitioning sketch plan is quite reasonable as the two co-owners will get equal shares separated by a centralized steel stair case. She added that the sub-division will offer a lasting solution to the contention between the two parties.
5. In response to the application, the plaintiff/respondent filed a replying affidavit sworn by Peter Ndungu Gathumbi on June 13, 2022. He agreed that the solution to their dispute will be resolved with finality if the suit property is partitioned but felt that the proposed partitioning is premature for the reasons he has provided. Mr. Gathumbi deposed that they have never denied the Applicant access to the suit property, and that she is at liberty to visit the premises at will as long as she does not harass the tenants through her agents and or auctioneers.
6. The respondent stated that they have demonstrated through their pleadings that they have no interest in the rental income due to the estate of Gichuru – deceased and the applicant has been collecting the said rents every month. The respondents avers that they are the ones who have endeavoured to improve the suit property. That Since 2018 they have been sourcing for financiers to develop the property upwards and had shared the idea with the applicant.
7. The respondent deposed further that they have identified a developer who is ready and willing to extend the suit property, create more floors and thereafter recover their money from rents. That the financier cannot commit due to the ensuing dispute between the parties. The respondent stated that they are opposed to the orders sought being granted as it will hinder their pursuit of the development which will also be a benefit to the defendant/applicant.
8. The applicant filed her written submissions dated November 15, 2022. She submitted that based on the pleadings on record, the Respondents have demonstrated their inability to appreciate the concept of joint ownership as they have consistently refused to recognise the applicant’s right to choose tenants or participate with the respondents in choosing potential tenants. The Applicant added that the Respondents have made concessions with existing tenants and third parties without her input or involvement including the current tenant to have him finance the renovations and recover the costs from rent.
9. The applicants raised the following issues as arising for determination by the court;
 - a. Whether the suit property is capable of being partitioned so that each of the co-owners could own and manage separate portions in respect of their shares therein.
 - b. Whether the co-ownership of the suit property should be severed.
 - c. Whether the Respondents are bound to suffer harm if the said orders are granted.
10. The applicant argues that the *Sectional Properties Act* allows parties to subdivide the building into units to be owned by individual proprietors and controlled, managed and administered through incorporated corporation (management company). She stated that she had attached a sectional plan of the building with a proposed mode of subdivision of the units between the two co-owners. The Applicant urges that the Respondent has not objected to the proposed partitioning.
11. On severance of the ownership, the Applicant submitted that the same is provided for under section 91(7) of the *Land Registration Act*, that the partitioning is crucial to the Applicant as it will allow her administer the estate of the deceased effectively. Further that the severance will facilitate decisions regarding future development of the suit property, renovations or expansions.



12. The Applicant took issue with the Respondents reply to the application on account of the following;
 - i. That the Respondents have not clearly stated how the partition will prevent any future plans for renovations, expansion or development of the suit property.
 - ii. The Applicant is certain that the Respondents have no concrete plan for development of the suit property and are using it as an excuse to maintain the status quo. That there are no definitive plans for development of the suit property presented to the court.
13. The respondents vide the submissions dated November 22, 2022 stated that they have not denied the Applicant access nor are they interested in rental income due to the estate of Samuel Gichuru – deceased hence they are not opposed to the granting of prayers 1, 2 & 3 of the application.
14. The respondents presented arguments on the issue of partitioning as so ought in prayers 4 – 7 of the application including; that the application is premature since the Applicant has not shown any interest in management of this company. According to the Respondents, the partitioning should be done upon completion of the construction of the upper floors and referred the court to photos of neighbouring buildings that are higher than theirs thus demonstrating the need to match neighbouring premises.
15. The respondents referred this court to their efforts at improving the premises which saw the rent increase from Kshs. 7,000/- to Kshs. 320,000. They accused the applicant of selfishness and dishonesty. That the building was constructed as a single unit with no special provisions made to having separate units for the two parties The Respondents contend that the structure as it is incapable of being partitioned in a manner that shall be practical. It is their further argument that there is need to have the top floors constructed with new architectural design that shall ensure there is complete severance.
16. They urged the court to take judicial notice of the fact that a monthly rent of such a building in the heart of the City Centre of Nairobi ought to fetch not less than Kshs.1,000,000/= yet it is only getting Kshs.320,000/= due to the applicant’s unjustified and unreasonable refusal to make it better. They submit that her acts and omissions aimed at frustrating the respondents is what is causing actual prejudice to the estate of her father as she is shooting down efforts to improve the suit premises.
17. It is the respondent’s further submission that the proposal to have a management company created to be jointly run by the applicants and the respondents beats all the facets of logic, taking note that the two opposing parties are not able to agree at this time, there is never a time that they shall ever agree to anything in regards to management and/or development of the suit premises. That the forming a management will create another problem over and above why the respondents came to court to cure.
18. The respondents submitted further that they wish to have the suit premises partitioned in a manner that each party shall be autonomous and independent of the other and that there shall be no need for consensus to be reached for anything. There would therefore be no need for creation of a management company as noting from the applicant’s conduct, she shall always oppose the ideas and proposals of the respondents without offering any alternative ideas. They urged the court that the parties be allowed to jointly source for developers and mutually agree on the development of the property. They concluded that the application should be dismissed with costs.

Determination:

19. There is no dispute on the issue of access as the respondent has conceded to. The remaining issue for my determination is the question of partitioning as pleaded in prayers 4 – 7 of the application. The applicant gave the reasons why she wanted the partition done of which is the respondents making decisions concerning the property without involving her.



20. From the reply by the respondents, this court has picked out three issues;
- i. The plaintiff/respondent do not deny that partitioning the property will solve the dispute between them with finality.
 - ii. There is evidence that the Respondents have in certain instances made decisions over operations of the property without key participation of the Applicant. For instance, at paragraph 9 and 10 of the replying affidavit where the respondents confirm entering into an arrangement with a tenant to construct a better structure and then recover the costs of construction from rent. The respondents deposed the arrangement was done with full knowledge of the applicant. This means that although the applicant may have been aware, she was not made a party to that agreement.
 - iii. The respondents have confirmed that they sourced a developer who is ready and willing to extend the property.
21. The respondent explained that the reasons they have always initiated these steps is because the applicant does not show interest in improving the property or being engaged in its management. The respondents added that once the proposed development is completed even the applicant will derive benefits. According to the respondents, it is at this point that the property can be partitioned between the two.
22. The parties herein are administrators of each estates of the deceased co-owners. As co-owners, they have equal rights in management or development of the property. Section 91(4) of the [Land Registration Act](#) provides thus;
- (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently:
 - “a) Dispositions may be made only by all the joint tenants.
- 91
- (7) Joint tenants, not being trustees may execute an instrument in the prescribed form signifying that they agree to sever the joint ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.”
23. The respondents is resisting the partitioning at this stage arguing that it will deny them the anticipated rental income upon completion of the proposed extension. The fears of the Respondents may be founded but from the arguments being put forth, their fears must be weighed against the interest of the Applicant. It is not possible to force someone to develop their premises to a certain level merely because the neighbouring buildings are high. The Applicant is an administratrix meaning that she represents not her personal interest but the interests of the beneficiaries of the Estate of John Gitau Gichuru. She cannot give consent to any proposed development unless there is an agreement from the beneficiaries of the said Estate.
24. The applicant has made a proposal on how the partitioning should be done. The Respondents did not give alternative on how to partition arguing that they can only partition after extension. It is my considered opinion that the partition of the suit property should not be pegged on the improvement of the property. If in future the respondents want to undertake any extension and the applicant refuses to



give consent, there are remedies available where consent is denied and which remedies can be invoked by the affected party.

25. It is my considered opinion and, so hold that the applicant has satisfied this court on the need to partition. However, I will not allow the partition in the manner proposed. Instead, I make an order that the partitioning shall be undertaken on terms that either party shall within 30 days hereof appoint an architect or engineer or both to give their professional opinion reduced in the form of a report on the best mode to partition the building. The parties have liberty to have the said professionals meet and prepare a joint report to be filed in court within 21 days of such meeting. In case there is no agreement, each side shall file their separate reports in court for the court's determination. Each party to meet the costs of their consultant architect/engineer. Each party meet the respective costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH, 2023

A. OMOLLO

JUDGE

In the Presence of

Lawrence Mbaabu advocate for the defendant/Applicant

Ms Kagucia for the Respondent

