



**Mathiu v Kirimi (Sued as the legal representative of the Estate of Moses Kirimi (Deceased)
(Environment & Land Case E020 of 2021) [2023] KEELC 17965 (KLR) (7 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E020 OF 2021**

CK YANO, J

JUNE 7, 2023

BETWEEN

ISABELA KANYUA MATHIU PLAINTIFF

AND

**TABITHA GACHERI KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF MOSES KIRIMI (DECEASED) DEFENDANT**

JUDGMENT

1. The plaintiff moved the court vide the originating summons dated 29th June 2020 seeking for orders and determination of the following questions-;
 - i. Whether the plaintiff and the deceased Moses Kirimi are the registered owners of land parcel No Meru Municipality Block II/760 in equal share.
 - ii. Whether the defendant should be compelled to surrender the original certificate of lease to the plaintiff for purposes of severing her half share of the parcel of land No Meru Municipality Block II/760.
 - iii. Whether in the alternative court to order for dispensation with production of the original certificate of lease in respect of Meru Municipality Block II/760 for purposes of subdivision of the property in equal share.
 - iv. Whether the defendant should be ordered to execute all the necessary documents to effect the transfer including application for consent and transfer of land parcel No Meru Municipality block II/760 and in default of compliance the Deputy Registrar be empowered to execute such instruments.
 - v. Whether the court should order lifting of restriction registered under Meru Municipality block 11/760 for purposes of sub division.



- vi. Whether the plaintiff is entitled to costs.
2. The summons is supported by an affidavit by the plaintiff sworn the same date.
3. The application is opposed through an affidavit sworn by the defendant on 9th August 2021.

Plaintiff's Case

4. The plaintiff averred that she together with the late Moses Kirimi Mbogori (deceased) are joint registered owners in equal shares of the property known as Meru Municipality Block II/760 (hereinafter referred to as the suit property) That Moses Kirimi is since deceased and his estate is still under succession vide high court succession cause No 22 of 2019. The plaintiff wishes to have the suit property subdivided in equal share and each share registered in the names of the respective parties.
5. It is the plaintiff's case that she has already initiated the process and that provisional approvals have been granted by the County Government of Meru. That through a letter from the ministry of lands, and physical planning, the Chief Land Registrar registered a restriction over the property pending the hearing and determination of the said succession cause.
6. The plaintiff avers that she has on numerous occasion requested the administrator of the estate of Moses Kirimi (deceased) the defendant herein to hand over the original certificate of lease of the property for the sole purpose of subdividing the property and having the shares registered in their respective names, but the plaintiff's requests have borne no fruit, hence the filing of this suit. The plaintiff avers that her only interest is having her half share of the suit property registered in her name. It is her contention that no prejudice shall be occasioned to either of the party or beneficiaries if this application is allowed as prayed.
7. The plaintiff testified as P.w 1 and produced copies of the certificate of lease approvals, letters and search as P Exhibits 1 – 5. The plaintiff was also cross examined and re-examined.

Defendant's Case.

8. The defendant's case is that she is just one of the beneficiaries of the estate of Moses Kirimi (deceased) and stated that they are yet to be issued with a Grant of Letters of Administration although they filed succession cause No 22 of 2019 that is still pending. The defendant therefore avers that she has no capacity to accede to the prayers sought by the plaintiff. It is the defendant's view that the plaintiff should await the determination of the succession cause. The defendant also pointed out that the plaintiff filed an application in the said succession cause to be enjoined as an interested party for purposes of seeking the same prayers as those herein and that the said application is still pending. It is the defendant's contention that the application herein is misconceived, without merit and an abuse of the court process and prayed for the same to be dismissed.
9. The defendant herein, Tabitha Gacheri Kirimi, testified as D.w 1 and adopted the facts contained in her replying affidavit as part of her evidence in chief. She also produced the application filed by the plaintiff in succession cause No 22 of 2019 as D exhibit 1.
10. D.w 1 confirmed that she filed succession cause No 22 of 2019 in respect of the estate of her deceased husband and is the proposed administrator but pointed out that there is an objection filed. D.w 1 also confirmed that the deceased and the plaintiff were co-owners of the suit property with equal shares each.



11. D.w 1 testified that she had no objection to the plaintiff getting her half share of the suit property and for the remaining half share to await the succession cause, but stated that that was subject to the agreement of the other administrators of the estate of the deceased.

The Plaintiff's Submissions

12. In her submissions dated 30th January, 2023 filed through the firm of Hiram Kirimi & Company Advocates, the plaintiff submitted inter alia, that it is not disputed that the plaintiff and Moses Kirimi (deceased) owned the suit property in equal shares. The plaintiff's counsel cited the provisions of Article 40 (1) of the Constitution and the definition of tenancy in common under the Land Act and relied on the case of Gatimu Kinguru v Muya Gathangi ([1976] eKLR. The plaintiff submitted that it was only her desire to have the suit property subdivided in equal shares so that she gets her share registered in her name to enable her develop it, adding that she had no interest in the share of the deceased. It is the plaintiff's submission that it would be unfair and unjust to keep her in abeyance pending the hearing and determination of the succession cause that might take time to conclude. The plaintiff contended that her share is not subject of the pending succession cause and submitted that the court is clothed with inherent jurisdiction under Article 159 of the Constitution to grant the orders sought.

The Defenant's Submissions

13. In her submissions dated 26th January, 2023 filed through the firm of Okubasu Munene & Kazungu LLP Advocates, it was submitted inter alia, that the defendant had not been issued with Letters of Administration and therefore had no locus standi to be sued. Counsel for the defendant cited the provisions of Order 4 Rule 4 of the Civil Procedure Rules and Section 45 (1) of the Law of Succession Act and relied on the case of Julian Adoyo Ongunga v Francis Kiberenge Abano, Migori Civil appeal No 119 of 2015 and Michael Otiemo Okongo (suing as the Legal Administrator of the estate of Odua Gigo, deceased) v Lameck Odoyo Obola & 4 others [2018] eKLR.
14. It is also the defendant's submission that the suit is premature and cited section 78 (1) of the Land Registration Act which gives the land registrar the mandate to order the removal of any restriction on a parcel of land upon the application of any person. It is therefore the defendant's submissions that the suit is premature and offends the doctrine of ripeness and of exhaustion of remedies. The defendant submitted that the plaintiff has not proved her case on a balance of probabilities and urged the court to dismiss it with costs.

Determination

15. The issue for determination is whether the plaintiff has proved her case on a balance of probabilities and if so, whether she is entitled to the orders sought. From the evidence adduced, it is not in dispute that there exists a co-tenancy between the plaintiff and Moses Kirimi (deceased) within the meaning of Section 91 (1) of the Land Registration Act which provides as follows-;

“In this Act, co- tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.”

16. And in considering whether the co-tenancy among the tenants herein was a joint tenancy or tenancy in common, the court is guided by Section 91 (8) of the Land Registration Act which provides as follows:-

“On and after the effective date, except with leave of a court the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that



between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common.”

17. Since the commencement date of the aforesaid Act was 2nd May 2012, and in the absence of evidence that leave of court was procured prior to the registration of parties as proprietors on 29th July 2020, this court takes the view that the tenancy herein was in common.
18. The law on severance of tenancy in common is found at Section 94 of the [Land Registration Act](#) which states as follows-;

“94

- (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
- (3) The registrar may, after hearing the applicant and any of the other tenants in common who wish to appear and be heard, make an order for the partition of land having regard to -;
 - (a) Whether the provisions of this Act, any other written law regulating the subdivision of land and any covenants and conditions in a land have been or will be complied with if the partition is effected,
 - (b) The nature and location of the land,
 - (c) The number of tenants in common and the extent of their respective shares particularly, the extent of the share of any tenant in common by whom or on whose behalf the application has been made,
 - (d) The value of any contribution made by any tenant in common to the cost of improvements to or the maintenance of the land or buildings occupied in common;
 - (e) -



- (f) -
- (g) -
- (h) The proper development and use of the land and whether it may be adversely affected by the partition applied for,
- (i) The hardship that would be caused to the applicant or applicants by the refusal to an order in comparison with the hardship that would be caused to any other person by making the order, and
- (j) Any other matters that the registrar considers relevant.

19. From the foregoing, it is clear that the procedure to be followed by tenants in common in seeking partitioning is well laid out. The applicant must make an application in the prescribed form to the registrar even without the consent of other tenants in common. In addition, Section 96 provides a leeway for a tenant in common to approach the court for an order of sale. However, the plaintiff herein has not sought an order for sale. Her recourse therefore lies in making an application for partition to the registrar as envisaged by Section 94 of the *Land Registration Act*.

20. It is trite law, that where the *constitution* and or statute has provided a dispute resolution procedure, then that procedure must be followed. The Court of Appeal in the case of *Speaker of National Assembly v Njenga Karume* (2008) 1 KLR (EP) 425 held inter alia that-;

“there was considerable merit in the submissions that where there was a clear procedure for the redress of any particular grievance prescribed by the *constitution* or an Act of parliament, that procedure should have been strictly followed”

21. The plaintiff is also seeking an order for the lifting of restriction registered in the suit property. Section 78 (1) of the *Land Registration Act* expressly provides that-;

“The Registrar may, at any time and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the registration an opportunity of being heard, order that the removal or variation of a restriction.”

22. The above Section expressly gives the registrar the power to order the removal of any restriction on land upon the application by any person.

23. It is therefore my finding that the plaintiff must exhaust the remedies stipulated by the *Land Registration Act*. The plaintiff has recourse under Section 94 of the *Land Registration Act* for the partition of the subject land that she holds in common with another tenant. Under the provision the other co-tenant need not consent to the partition. Further, the plaintiff has recourse under Section 78 of the same *Act* for the removal of the restriction. In view of these, this court cannot grant the orders sought.

24. The upshot of the foregoing is that the suit herein is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE 2023.

IN PRESENCE OF



Kirimi present for plaintiff
Mwirigi present for defendant
Court Assistant- V. Kiragu

C.K YANO

JUDGE

