



**Njuguna v Njuguna & another (Environment & Land Case
E019 of 2022) [2023] KEELC 17859 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E019 OF 2022**

OA ANGOTE, J

JUNE 8, 2023

BETWEEN

JUSTIN GACHURU NJUGUNA PLAINTIFF

AND

OSCAR MACHARIA NJUGUNA 1ST DEFENDANT

THE DEPUTY REGISTRAR ENVIRONMENT AND LAND COURT

NAIROBI 2ND DEFENDANT

JUDGMENT

Background

1. Vide an Originating Summons dated April 26, 2022 brought pursuant to the provisions of Section 96 of the [Land Registration Act](#) and Order 37 Rules 8 and 14 of the [Civil Procedure Rules, 2010](#), the Plaintiff has asked this Court to answer the following questions
 - i. Whether the Plaintiff and 1st Defendant are the registered proprietors of Land Reference Number 209/380/2 as tenants in common?
 - ii. Whether the 1st Defendant has unreasonably refused and/or neglected to co-operate with the Plaintiff in the proper management and preservation of Land Reference Number 209/380/2?
 - iii. Whether this Honourable Court can sever the tenancy in common in respect of Land Reference Number 209/380/2?
 - iv. Whether severing the tenancy in common between the Plaintiff and the 1st Defendant over Land Reference Number 209/380/2 would adversely affect its proper use and management?
 - v. Whether this Honourable Court should appoint an independent Government Valuer to determine the market value of the suit property?



- vi. Whether the suit property should be sold by public auction or private treaty and proceeds of the sale shared equally between the Plaintiff and the 1st Defendant?
 - vii. Whether the 1st Defendant should be compelled to execute necessary documents for the sale of the suit property to a third party?
 - viii. Whether in the alternative to question 7 above, the 2nd Defendant should be compelled to execute transfer documents, for purposes of sale to a third party and subsequent sharing of proceeds between the Plaintiff and the 1st Defendant?
 - ix. Who should bear the costs of this summons?
2. The application is supported by the affidavit of the Plaintiff, Justin Gachuru Njuguna of an even date, who deponed that the 1st Defendant is his brother and co-tenant in common equal shares for an estate in fee simple of all that piece of land containing by measurement 0.5 of an acre or thereabouts and known as Land Reference No 209/380/2 (the suit property) and that following the passing on of their father on May 23, 1999, he and the 1st Defendant inherited the suit property pursuant to a Deed of Assent executed by Almadea Njuguna, the duly confirmed personal representative of their late father's estate.
 3. It was deposed that the suit property is a prime property with existing buildings and improvements thereon being two four bedroomed houses which have been rented to tenants every now and then; that their mother lived in one of the properties until her demise on September 6, 2018; that during her occupation, she received rental proceeds from the other house and that since the demise of their mother and the distance between himself and the 1st Defendant, they have developed irreconcilable differences making their tenancy in common unfavorable.
 4. It is the Plaintiff's case that to avoid wastage, he tried engaging the 1st Defendant with a view to selling the property but the 1st Defendant declined to co-operate; that as a result, the property is being wasted having no tenants and on the occasion where there are tenants, he is not privy to any rental income and that the continual fall out between himself and the 1st Defendant means that the suit property has not been developed to maximize its full potential.
 5. According to Mr Njuguna, the property is currently occupied but the tenant is paying rent that is below the market value and attempts to communicate with the 1st Defendant to renew the tenancy agreement upwards have been futile; that the 1st Defendant has further refused to submit the relevant documents to an accountant to enable them file tax returns for the rental income and that there have been several attempts at mediation through the family and Advocates, all of which have been unsuccessful.
 6. According to the Plaintiff, as tenants in common, he and the 1st Defendant own inseparable shares of the suit property and any dealings with the suit property must be mutually agreed upon; that tenants in common may with the consent of other tenants make an application for the partition of the land occupied in common; that in this case, consent has been denied and that where land sought to be partitioned is incapable of being partitioned, or the partition would affect the proper use of the land, the tenants in common may make an application for sale.
 7. The Plaintiff finally deponed that in light of the development on the suit property, partitioning the same would adversely affect the proper use of the land, its value and competitiveness; that the best course of action would be the sale and sharing of proceeds and that due to the 1st Defendants



un-cooperative conduct, there is need to have the 2nd Defendant execute the relevant documents to facilitate a sale.

8. The was no response to the Originating Summons.
9. The Plaintiff filed a further Affidavit on July 8, 2022. He reiterated the averments in his Supporting Affidavit stating that due to the fact that he is domiciled in the United Kingdom whereas the 1st Defendant is domiciled in Kenya, he relies on the 1st Defendant to manage and preserve the suit property in good faith and that the suit property currently has two four bedroom houses, one of which is rented out to a tenant who pays a monthly rent of Kshs 75,000.

Submissions

10. The Plaintiff's counsel submitted that the Plaintiff and the 1st Defendant are tenants in common, whose key feature is as expressed by the Court in *Isabel Chelangat vs Samuel Tiro Rotich & 5 Others* [2012]eKLR that the two or more holders hold the property in equal undivided shares where each tenant has a distinct share in the property which has not yet been divided among the co-tenants.
11. Counsel submitted that according Section 96 of the *Land Registration Act*, the Court may on application order for the sale of land where partition is untenable; that whereas Section 94 of the *Land Registration Act* provides for an internal mechanism for severing a tenancy in common by way of partition before approaching the court, the suit property is located in Hurlingham, and any partition will greatly and adversely affect the suit property.

Analysis and Determination

12. The Plaintiff has instituted this suit seeking for a determination of a series of questions consisting of the existence of a tenancy in common between himself and the 1st Defendant; whether the tenancy in common has become untenable necessitating its severance and the sale of the suit property and; the manner of selling the suit property and sharing the proceeds.
13. The 1st Defendant neither entered appearance nor filed any response leaving the Plaintiffs evidence uncontroverted. Nonetheless, it is now settled that uncontroverted evidence is not automatic evidence and the Plaintiff is still required to prove his case on the required standard of balance of probabilities.
14. This is captured in Section 107(1) and (2) of the *Evidence Act*, which provide as follows:
 - “ 1 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - 2 When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
15. Sections 109 and 112 of the same Act provide as follows:
 - “ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”



16. The present suit has been brought by way of Originating Summons pursuant to Order 37 Rules 8 and 14 of the Civil Procedure Rules. Rule 14 aforesaid sets out the form of the Originating summons whereas rule 8 states that an application under the [Land Registration Act](#), 2012, other than under Part VII and Part VIII thereof, shall be made by Originating Summons, unless there is pending a suit involving the same land when the application may be made in that suit.
17. According to the Plaintiff, him and the 1st Defendant are siblings and tenants in common over the parcel of land known as L R 209/380/2 situate in Kilimani, which property consists of two four bedroomed houses; that he lives abroad while the 1st Defendant lives here and is in charge of the suit property and that his relationship with the 1st Defendant has irretrievably broken down causing difficulties in the management of the property.
18. It is the Plaintiff's case that the tenancy in common ought to be severed and the suit property sold and proceeds shared equally between them.
19. The Plaintiff adduced in evidence the Deed of Assent dated March 19, 2000, email correspondence from the 1st Defendant to the Plaintiff dated March 7, 2021 acknowledging the tenancy in common, email correspondences of June 15, 2021 and August 3, 2021 regarding discussions on the sale of the suit property and various WhatsApp correspondences.
20. Considering the Deed of Assent dated April 19, 2000, there is no doubt that the Plaintiff and the 1st Defendant are tenants in common of the suit property herein. A tenancy in common is recognized as a means of joint ownership of property. Section 91 of the [Land Registration Act](#) 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.”
21. Sections 94 and 96 of the [Land Registration Act](#) provide for a severance of a common tenancy by way of partition or sale of the land. The questions before this Court concern the sale of suit property, and sharing of the proceeds thereof equally between the parties herein. Section 96 of the [Land Registration Act](#) provides as follows;

“96

 - 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.”
22. The court has considered the Plaintiff’s Affidavit and the provisions of Section 96 (1) of the said Act which gives the court discretion to make such orders for the valuation and sale of land held in common either by public auction or any other means. Sub- section 96 (3) above is clear that a tenant in common is entitled to purchase the land or any share of it that is offered for sale, either at an auction or by private sale.
23. Considering the evidence, it is apparent that the relationship of the parties herein is no longer cordial. The Court is also convinced that the nature of the property does not favour partition. It is apparent that the only way the Plaintiff can enjoy his constitutionally guaranteed right to property is through severance of the tenancy in common and sale of the property.
24. That being the case, the court proceeds to determine the questions framed in the Originating Summons dated April 26, 2022 and enters judgment for the Plaintiff in the following terms;
- i. The Plaintiff and the 1st Defendant are the registered proprietors of Land Reference Number 209/380/2 as tenants in common.
 - ii. The 1st Defendant has unreasonably refused and/or neglected to co-operate with the Plaintiff in the proper management and preservation of Land Reference Number 209/380/2.
 - iii. The tenancy in common in respect of Land Reference Number 209/380/2 is hereby severed.
 - iv. The Deputy Registrar of this court shall appoint an independent Government Valuer to determine the market value of the suit property within 30 days.
 - v. Upon the said valuation, the suit property shall be sold by a court appointed licensed auctioneer by way of public auction and the proceeds of the sale shared equally between the Plaintiff and the 1st Defendant, upon deduction of the auctioneer’s fees.
 - vi. The Deputy Registrar of this court shall execute the transfer documents, for purposes of sale of the suit property and subsequent sharing of proceeds between the Plaintiff and the 1st Defendant.
 - vii. The 1st Defendant shall bear the costs of the summons.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF JUNE, 2023

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Gali for the Plaintiff

No appearance for the Defendant

Court Assistant – Tracy

