



**Minyaga v Onyino & 2 others (Environment and Land Appeal
E021 of 2022) [2023] KEELC 20675 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

E ASATI, J

OCTOBER 12, 2023

BETWEEN

RUSALINA ACHOLA MINYAGA APPELLANT

AND

MAURICE OTIENO ONYINO 1ST RESPONDENT

SHEILA KASISI OTENDO 2ND RESPONDENT

VINCENT OCHIENG OOKO 3RD RESPONDENT

*(Being an appeal from the judgement and order of the Senior Principal Magistrate's court
at Tamu (Hon A. K. Mokokross) given on the 29th March 2022 and in ELC NO E001 OF 2021)*

JUDGMENT

1. The Appellant herein, Rusalina Achola Minyaga, was the Plaintiff in Tamu CMC Environment & Land Case No E001 of 2021 wherein she sued Maurice Otieno Onyino as the Defendant and Sheila Kasidi Otendo as third party and Vincent Ochieng Ooko as Interested Party. In the suit, the Appellant contended that parcel of land known as Kisumu/wanga'ya 1/2324 was registered in her name as co-owner with one Enos Adoyo Ajuok- Deceased. That since theirs was a joint tenancy, as opposed to tenancy in common, she has a right of survivorship hence the land ought, upon the death of the deceased to revert to her wholly. The Appellant therefore sought for orders of;
 - a. A mandatory injunction directing the Land Registrar, Nyando/Muhoroni/Nyakadu sub-counties to remove the name of Enos Adoyo Ajuok, deceased as the co-owner of Kisumu/wang'aya/2324 and to register the Plaintiff as the sole owner of the property.
 - b. A mandatory injunction directed to the Defendants to immediately vacate the suit property
 - c. General damages for trespass and mesne profits.



- d. Cost of the suit.
2. The Defendant and third party opposed the suit and averred that what existed between the Appellant and the deceased was a tenancy in common hence upon the death of the deceased, his heirs were entitled to the deceased's share in the property.
3. The suit was heard by the trial court at Tamu and vide its judgement delivered on March 29, 2022, the court found that the Plaintiff had failed to prove her claim on a balance of probabilities and dismissed the suit with no order as to costs.
4. Aggrieved by the judgement, the Appellant filed the appeal herein vide the Memorandum of Appeal dated February 22, 2022 and filed in court on April 13, 2022. The Memorandum of Appeal appears to have been drawn and dated before the judgement was delivered but nonetheless the same was filed within the period provided by law. The Appellant sought for orders that;
 - a. The appeal be allowed
 - b. The judgement of the honourable Magistrate at Tamu delivered on the March 29, 2022 and any consequential orders be set aside
 - c. The cost of the appeal be awarded to the Appellant.
5. The grounds upon which the appeal was brought were that the honourable court erred in law and fact;
 - a. in finding that the ownership of the property Kisumu/Wangáya 1/2324 by the appellant and Enos Adoyo Ajuok (deceased) was a tenancy in common.
 - b. in mixing up definitions of joint tenancy and tenancy in common hence arriving at the wrong decision.
 - c. in disregarding an established concept of law that where individual shares are not expressly stated then the presumption is that the property is owned through a joint tenancy.
 - d. in disregarding the fact that the adjudication record provides that the land was owned by the appellant and Enos Adoyo Ajuok deceased in indivisible share.
 - e. in disregarding the fact that the ownership of the property was joint, indivisible, inseparable and unseverable.
 - f. in ignoring the history of how the name of Enos Adoyo Ajuok (deceased) was entered into the register as a co-owner of the property.
 - g. in not finding that the property had passed to the appellant by operation of law.
 - h. in failing to determine all the issues before him.
 - i. in not finding that the 1st Respondent is trespassing on the property and therefore infringing on the appellant's right to property.
 - j. in appearing to sanction the 1st Respondent's illegal and unlawful occupation of the property.
 - k. in not finding that the purported sale of a portion of the property to the 1st Respondent is illegal, null and void.
 - l. in not finding that the sale agreement relied upon by the 1st Respondent was made contra statute and is therefore unenforceable.



- m. in not awarding the plaintiff damages for trespass and mesne profits.
 - n. in not ordering the 1st Respondent to vacate the suit property.
 - o. In denying the appellant the costs of the suit.
 - p. In failing to appreciate the applicable principles of law therefore arriving at erroneous findings.
 - q. In failing to do justice before him.
6. Directions were taken on May 2, 2023 that the appeal be canvassed by way of written submissions.

Issues for Determination

7. Though the Appellant listed 17 grounds of appeal in challenging the findings and decision of the trial court, I find that the grounds revolve around one substantive issue namely whether the relationship between the Appellant and the deceased in respect of the registration of the suit land was a joint tenancy or a tenancy in common. All the other matters raised in the Memorandum of Appeal inclusive of the land sale agreement are dependent on the decision on this substantive issue.

Analysis and Determination

8. This being a first appeal, the court reminds itself of the duty to re-examine and re-analyse the evidence placed before the trial court.
9. The evidence placed before the trial court by the Appellant comprised of her testimony, the testimony of the witness she called and the exhibits produced. The Appellant's evidence was that her husband welcomed the deceased's mother by the name of Margarita Odongo to the land because there was constant flooding at their home in Karachuonyo. That during adjudication, because the deceased was found to be the eldest, his name was included in the register. That they agreed that Margarita and Enos could stay on the land but if Margarita and Enos pass on, then the land would remain hers. That the deceased and her never agreed to share the land equally. That she never sold the land to the 1st Defendant. That the 1st Defendant has planted sugarcane on the disputed portion of land, has harvested twice and there was a third ratoon at the moment of testifying for harvesting.
10. PW.2 testified and produced certificate of official search in respect of the suit land as exhibit and reiterated the evidence of PW1, the appellant.
11. The Defendant testified that he bought a portion of the suit land from one Michael vide a land sale agreement dated November 2, 2017. That the seller was the person to whom the deceased's share of the suit land had been bequeathed as the deceased had no family. That before entering into the sale agreement, he did due diligence by doing search at the land's office. That he confirmed that the Appellant and her son Pius had settled and fenced off their entire share. That he went to the land adjudication office at Awasi and confirmed that the land was owned in common with equal shares between the deceased the Appellant. That he also went to the neighbours. He produced land sale agreement dated November 2, 2017 and a copy of adjudication records in respect of the suit land as exhibits.
12. DW2 reiterated the testimony of DW1 and stated that the sugarcane planted by DW1 stands where Margarita, the deceased's mother, used to live.
13. DW3 was the Interested Party in the suit. His statement was that the land originally belonged to his great grandmother one Margarita Odongo Ajuok who accommodated Rosalina Acholla Minyanga,



the Appellant herein, when she migrated from her original home by offering her a portion on the suit land to establish a home and stay with PW2.

14. The third party's witness statement dated March 30, 2021 was admitted by consent as evidence without calling her. She narrated in the statement how the land was given to her husband because the deceased had no family. That it is her husband and her who sold the land to the Defendant, that there was no objection by the Plaintiff and her son, PW2, who were aware of the sale and that the Plaintiff and her son together with her and other people helped the Defendant to plant sugarcane on the land in April, 2018. That the Appellant waited until the death of her husband who died in February, 2020 to file the suit. That the Appellant and her son have settled on their portion which is well fenced from the rest of the suit land.
15. The trial court considered the Plaintiff's contention in the case and observed that it was clear that the Plaintiff's suit was based on the doctrine of survivorship in joint tenancies. The court found that the ownership to the subject land was a tenancy in common with the plaintiff and the deceased Enos Adoyo Ajuok holding undivided equal shares in the land. That being a tenancy in common, entitled the said Enos Adoyo Ajuok to pass his interest on to his heirs.
16. The Appellant faults these findings and the ultimate decision by the court.
17. Through the written submissions dated May 26, 2023, the Appellant submitted that in a joint tenancy, the proprietors' individual shares don't exist and are not defined. They own the whole parcel as one person and no one can exclude the other from any part. That in tenancy in common, the individual share is specifically defined in the land register, the appellant referred the court to four unities of tenancy in common, namely; unity of possession, unity of interest, unity of title and unity of time.
18. Counsel for the Appellant relied on the case of [*Mukazitoni Josephine –vs- Attorney General Republic of Kenya \(2015\) eKLR*](#), Chesire & Burns's Modern Law of Real Property and Section 91 of the [*Land Registration Act*](#), among other authorities on the definition and distinction of the concepts of joint tenancy and tenancy in common.
19. Counsel submitted that if the land register does not specify the share of each co-owner then the case is that of a case joint tenancy. That in such a case, the share of each owner cannot be identified, severed, divided or separated. That the trial court failed to address its mind to Section 91 of the [*Land Registration Act*](#).
20. Counsel submitted further that from the certificate of official search produced as exhibit, the court can tell that there were no words from the land records to show that the co-owners were to take distinct, severable and separable shares. That the word 'indivisible' in the adjudication record produced as exhibit means that the land was inseparable as opposed to undivided which means one unit that is not yet divided. That indivisible means not divided. That the trial court mixed up the definition of indivisible and undivided hence arrived at the wrong verdict. That the meaning of the words in the adjudication register was that the land was not to be divided or severed by either of the registered owners and that they owned the whole of it as equal and as joint holders of a single title. So that at the death of one of them, the dead tenant's interest in the land vests in the surviving tenant pursuant to the provisions of Section 91(4) of the [*Land Registration Act*](#).
21. That the land the 1st Defendant bought was Kisumu /wawidhi 1/2324 as shown in the agreement and not the suit land and that the people who sold the land to the 1st Defendant had no capacity to sell.
22. Counsel faulted the trial court for not addressing all the issues. That the trial court did not address the critical issues of possession, use of and benefits from land which come hand in hand with registered



ownership. That by failing to find that the sale of the land to the 1st Respondent was illegal, null and void and by failing to find that the 1st Respondent's occupation, use and benefit from the suit land violated the Appellant's property right of ingress, egress and regress enshrined under Article 40 of the Constitution of Kenya, the court did not do justice.

23. Counsel urged the court to grant the orders sought in the plaint, assess damages for trespass against the 1st Respondent at Kshs 500,000/- and award costs to the Appellant. In addition, Counsel urged the court to uphold the provisions of Section 91(4) of the Land Registration Act.
24. Section 91 of the Land Registration Act relied on by the appellant herein makes provision for meaning and incidents of co-tenancies. Sub-section 1 thereof defines co-tenancy. Sub-section 2 provides that where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights, there shall be a presumption that they hold the interest as tenants in common in equal shares.
25. The certificate of official search produced as exhibit does not show the shares for each of the proprietors. The adjudication register shows that each proprietor was to have indivisible equal shares in the land. The registration of the suit land in the name of the Appellant and the deceased was a first registration. The adjudication register being the first record of the rights of proprietors in the land contains information as to how the co-owners were to hold the land. Though Counsel has explained at length the meaning of the word 'indivisible' as opposed to undivided, in my view the addition of the words 'equal shares in the land' in the adjudication record clearly shows that the shares of the co-owners was determined as equal share of the land. This is supported by the provisions of section 91(2) which provides that

' Except as otherwise provided, in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.'
26. The Appellant faults the trial court for not taking into account the history behind the co-ownership. I have noted that each of the parties had a different version of the history behind the registration of the Appellant and the deceased as co-owners of the land. The appellant's version was that her late husband invited one Margarita Odongo, the mother of the deceased to the suit land and accommodated her because she had no where to go as there were floods at Karachuonyo where she was married. That during land adjudication the deceased was found to be the eldest and he together with the appellant were registered as co-owners. That they agreed that should Margarita and the deceased pass on, the land was to revert to the appellant. That they did not agree that they were to share the land equally.
27. However, the Respondent's version as narrated by DW3 was that the suit land belonged to her grandmother Margarita Odongo Ajuok. That the said Margarita Odongo accommodated the appellant on the suit land by giving the appellant a portion thereof when the appellant migrated from her original home, to establish her home and stay with her son PW2. That Rusalina was to own only the portion occupied by herself and her son which they still occupy to date.
28. So is it that the land originally belonged to the appellant's husband who invited and accommodated Margarita or did it belong to Margarita who invited and accommodated the appellant? The burden of proof was upon the appellant to prove that her version was the authentic one. The appellant did not discharge this burden.



29. I find that the co-ownership was a tenancy in common. And that under section 91 (3) of the [Land Registration Act](#) each of the tenants was entitled to an undivided share in the whole land and on the death of a tenant the deceased tenant's share shall be treated as part of his estate.
30. On the propriety or legality of the alleged purchase of the deceased's share by the 1st Respondent, my view is that, that is a matter to be taken up by the heirs of the deceased in a Probate and Administration proceedings. The appellant has no valid claim on the deceased tenant's share of the suit land. There is no evidence that the appellant occupies the entire land and particularly the portion that was previously occupied or owned by the deceased and his mother. The evidence on record is that it is the 1st Respondent who is in occupation, that he utilized the land to plant maize and currently sugar cane which he had harvested twice and was waiting the third harvest. That the appellant had settled with PW2 on her share which was well fenced.
31. For these reasons I find that the appeal lacks merit. The trial court did not err in its decision. I find no cause to interfere with the findings and decision of the trial court. The appeal is hereby dismissed. Each party to bear own costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 12TH DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Ajevi: Court Assistant.

Odhiambo for the Appellant.

No appearance for the Respondents.

