



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**CASE NO. E.L.C. E083 OF 2021.**

**TESHA NJOKI MAHIHU.....PLAINTIFF**

**-VERSUS-**

**DORIS NYAMBURA MWANGI alias DORIS NYAMBURA J.M. KARIUKI.....DEFENDANT**

**RULING**

**Introduction**

1. The Notice of Motion hearing is the one dated the 2<sup>nd</sup> of March 2021, which seeks a raft of orders as hereunder;

*i. The application be certified as urgent and same be heard ex parte in the first instance.*

*ii. A temporary injunction restraining the defendant whether by herself, her servants, workmen, agents or otherwise howsoever from selling, dealing, interfering, alienating or disposing or in any way interfering with the plaintiff's quiet possession of the property known as House Number 9, Northbrook Gardens developed on Land Reference No. 330/234 situate on Hatheru Road, Lavington in Nairobi pending Interpartes hearing and determination of this application.*

*iii. A temporary injunction restraining the defendant whether by herself, her servants, workmen, agents or otherwise howsoever from selling, dealing, interfering, alienating or disposing or in any way interfering with the plaintiff's quiet possession of the property known as House Number 9, Northbrook Gardens developed on Land Reference No. 330/234 situate on Hatheru Road, Lavington in Nairobi pending the hearing and determination of the suit.*

*iv. Any other order that this Honorable court may deem fit to grant.*

2. The Notice of Motion Application under Reference, is anchored on various grounds, which have been enumerated at the foot thereof and same is further supported by an affidavit sworn by the Plaintiff/Applicant, sworn on 2<sup>nd</sup> March 2021, to which the Plaintiff/Applicant has attached a bundle of exhibits including a copy of the lease instrument, pertaining to the suit property, which shows that the suit property was purchased by and ultimately registered in the names of Anthony Muchiri Kariuki and Tessa Njoki Mahihu Muchiri, respectively, the latter who is the Plaintiff/Applicant, as Joint Tenants.

3. It is apparent the Anthony Muchiri Kariuki, passed and/or died on the **1<sup>st</sup> November 2020**, and upon his death, a dispute arose, touching on and/or concerning ownership of the suit property. For clarity, the suit property is now being claimed by the Defendant/Respondent, who is the mother of Anthony Muchiri Kariuki, (now deceased).

4. Upon the filing of the subject notice of motion Application herein, same was duly served upon the Respondent who thereafter filed a replying affidavit opposing the notice of motion. For clarity, the affidavit which is erroneously titled as Supporting affidavit, is sworn on the **3<sup>rd</sup> May 2021**.

**DEPOSITION BY THE PARTIES**

**PLAINTIFF'S /APPLICANT'S AVERMENT**

5. The Plaintiff/Applicant herein has stated in her affidavit that same was lawfully and/or duly married to one Anthony Muchiri Kariuki, (now deceased) and that the marriage was solemnized at **St. Peters Nyali ACK Church on the 11<sup>th</sup> December 2005**.

6. It is the Plaintiffs further deposition that during the course of the marriage, Anthony Muchiri Kariuki, now Deceased, and herself acquired the suit property, which was registered in their joint names as joint owners thereof.

7. It is further the Plaintiffs/Applicants position that the suit Property herein was their matrimonial property and thus both Anthony Muchiri Kariuki and herself had rights and/or interest over same.

8. Be that as it may, the Plaintiffs/Applicants further avers, that upon the death of Anthony Muchiri Kariuki, the Defendant herein started harassing her and seeking to taking possession of the suit property, whereby the Defendant/Respondent contended that the suit property exclusively belonged to and thus forms part of the estate of the deceased.

9. However, the Plaintiff/Applicant avers that by virtue of having been joint owners (joint tenants), the suit property has now devolved to and now belongs to herself, exclusively on the basis of the Doctrine of survivorship.

#### **THE DEFENDANT'S/RESPONDENT'S CASE**

10. Pursuant to and by dint of the Supporting Affidavit, which no doubt would have been titled a Replying Affidavit, the Defendant/Respondent avers that Anthony Muchiri Kariuki, (now deceased), was her son.

11. Besides, the Defendant/Respondent further avers that the deceased, married the Plaintiff/Applicant herein and that same cohabited together, up to and including the year 2009, when the Plaintiff/Applicant herein moved from the matrimonial home. In this regard, the Defendant avers that the deceased and the Plaintiff were indeed estranged.

12. It is the Defendant/Respondent further deposition that the deceased herein was working in the United State of America and that same was the only one who contributed and/or otherwise, the one who paid the consideration of the purchase of the suit property.

13. According to the Defendant, the suit property herein lawfully belonged to the deceased and that upon the death of the deceased, the suit property comprises of and/or forms part of the estate of the deceased.

14. It is also the Defendant's further averments that after the death of the deceased, she took out and/or obtained Grant of letters of Administration ad litem and in this regard, she (Defendant) is now the legitimate administrator of the estate of the deceased and thus has a better claim thereto than the Plaintiff/Applicant.

15. Finally, the Defendant/Respondent has also deponed that the Plaintiff/Applicant herein took possession and/or entered in to the suit property by force after the tenant who was therein vacated, upon the lapse of the tenancy.

16. Other than the depositions of the parties herein, same have also filed written submissions pertaining to and/or concerning the subject notice of motion, raising pertinent issues and essentially as concerns who has a better title/claim to the suit property, which is the subject is the current Application.

#### **ISSUES FOR DETERMINATION**

17. Having considered the depositions by the parties as well as the written submissions filed and coupled with the facts that the subject Application concerns the grant the orders of temporary injunction, the following issues arise for determination;

- i. *Whether the honourable court herein has jurisdiction to determine the matter*
- ii. *Whether the Plaintiff/Applicant has a prima facie case with overwhelming chances of success*
- iii. *Whether the Plaintiff/Applicant shall suffer irreparable loss in the event the injunction is not granted.*
- iv. *In whose favor does the balance of convenient tilts.*

#### **ANNALYSIS AND DETERMINATION**

##### **ISSUE NUMBER 1**

##### ***Whether the honourable court herein has jurisdiction to determine the matter***

18. Pursuant to paragraph 22 of (sic) of the supporting affidavit filed by the defendant/Respondent same has contended that this honourable court lacks jurisdiction to hear and determine the subject suit given that the joint tenancy of the suit property have been severed.

19. From the forgoing depositions, it becomes apparent that the Defendant/Respondent herein, is contesting the jurisdiction of the honourable court to adjudicate upon and/or determine the subject dispute. In fact, the Defendant/Respondent contends that the issue of ownership of the property can only be determined by the Probate and Administration court and not otherwise.

20. Owing to the foregoing position by the Defendant/Respondent, it is thus imperative that the honourable court disposes of the jurisdictional question. In any event, jurisdiction is everything and if the honourable court is not seized of such jurisdiction, then the

honourable court must down its tools at the earliest moment.

21. To vindicate the foregoing position, I can do no better than refer to the decision in the case of **Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 others [2013] eKLR**, where the honorable court observed as hereunder;

*“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren *cul de sac*. Courts, like nature, must not act and must not sit in vain”.*

22. Given the foregoing position, it is therefore important for this court to settle the issue of jurisdiction, as pertains to the subject matter. To this end, it is common ground that the subject dispute touches on ownership, possession and/or title to the suit property.

23. It is also important to observe that the only court that is conferred with the mandate and/or jurisdiction to deal with and/or handle such matters is with environment and land court. In this case the provisions of Article of 162(2) are pertinent and/or Germane.

24. At any rate, the extent and mandate of the environment and land court was dealt with and/or delineated by the decision of the Court of Appeal in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** where the honourable observed as hereunder;

*“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus doctrine* nor **Article 260** whether expressly or by implication recognizes charging land as connoting land use”.*

25. As pertains to the subject matter, the issue in dispute is ownership, right to use and title. Consequently, the appropriate court that is bestowed with the jurisdiction, to entertain and adjudicate upon the subject matter is this honourable court and not the Probate and Administration court.

26. In the premises, it is my finding that the preliminary objection raised by the Defendant touching on and concerning the issue of jurisdiction, is misconceived and otherwise legally untenable.

## **ISSUE NUMBER 2**

### **Whether the Plaintiff/Applicant has a prima facie case with overwhelming chances of success**

27. The Plaintiff/Applicant herein is seeking orders of temporary injunction and in this regard, the Plaintiff/Applicant is thus enjoined to meet and/or satisfy certain basic pre-conditions, which were well delineated in the case of **giella v cassman brown (1973) E. A 358**

28. First and far most, the Plaintiff/Applicant herein is obliged to prove and established that the same has a prima facie case with overwhelming chances of success. Perhaps it is imperative to appreciate what constitute a prima facie case.

29. The meaning and import of a prima facie case, has been variously defined and in this regard I hasten to refer to the decision **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, where the court observed as hereunder;

*“What I have to determine here is whether on the material presented, this court properly directing itself can conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. The plaintiff’s case is that the 3<sup>rd</sup> defendant in its present form was conceived from a joint venture between the plaintiff and the 1<sup>st</sup> defendant. It is his case that the 1<sup>st</sup> defendant was at one point the majority shareholder of the 3<sup>rd</sup> defendant which shares he held both for himself and the plaintiff before he transferred the same to the 2<sup>nd</sup> defendant, his wife. It is not contested that the 2<sup>nd</sup> defendant is the wife of the 1<sup>st</sup> defendant as well as the averments that the 2<sup>nd</sup> defendant is now the majority shareholder in the 3<sup>rd</sup> defendant a clout, she acquired courtesy of the 1<sup>st</sup> defendant’s magnanimity. The 3<sup>rd</sup> defendant’s position is that he, 3<sup>rd</sup> defendant, is a separate legal entity and therefore arrangement between the 1<sup>st</sup> defendant and the plaintiff should not affect the 3<sup>rd</sup> defendant. However, it is well established that in deserving cases, courts of law are empowered to unmask the veil of incorporation.....*

*There are also copies of correspondences (sic) purportedly emanating from the 1<sup>st</sup> defendant and a reading of the same show, prima facie at least, that there was a relationship in existence between the plaintiff and the 1<sup>st</sup> defendant which relationship went beyond the ordinary principal and agent. There are implied indicators that the two had some venture one way or another. What else would someone make out of the employment of such phrases as “and you are the only counterpart for me”? I am not saying conclusively that there was a partnership. What I am saying is that the evidence on record shows that the relationship ran deeper than suggested by the defendants. The 3<sup>rd</sup> defendant, however, would have nothing to do with this relationship since it is a different person and was not privy to the on goings (sic) between the two friends-turned-foes.*

*A company registered under Cap 486 is, of a course, a distinct legal entity from the shareholders. However, that incorporation,*

***as already stated above may be unmasked. When the same is done, the individuals behind the company are revealed and according to the plaintiff, when that revelation comes out it will be clear that he is also part and parcel of whatever constitutes the 3<sup>rd</sup> defendant. That however, will await the main suit.”***

30. In respect of the subject matter, the Plaintiff/Applicant herein contend that the suit property was registered in the names of the deceased and herself, as joint tenants. In this regard, the Plaintiff/Applicant has tendered to the honourable court a copy of the lease instrument, confirming and/or attesting to the nature of property Rights.

31. It is common ground that the ownership over and in respect of the suit property was joint, indeed the joint tenancy is confirmed by the Defendant/Respondent in her affidavit, save that the Defendant/Respondent places a rider that the joint tenancy was severed by estrangement between the Plaintiff/Applicant and the deceased.

32. Having found that the nature of ownership rights, over and in respect to the suit property was joint tenancy, (which is corroborated by the Defendant) the question then is what happens to the property upon the death of the one of the joint tenants.

33. To answer the foregoing question, I invoke and rely in the decision in the case of **Mukazitoni Josephine v Attorney General Republic Of Kenya [p2015] eKLR**, where the honourable court observed as hereunder;

*“A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as totum tenet et nihil tenet, a joint tenant holds everything and nothing”.*

34. On the other hand, upon the death of one of the joint tenants, the Doctrine of Jus accrescendi (right of survivorship), applies and/or accrues. In this regard the entire property thus devolves to and inheres in the name of the survivor. For clarity, the survivor in the instant matter is the Plaintiff/Applicant.

35. In support of the foregoing position, I take refuge in the decision in the case of **MWANGI GAKURI V BENARD KIGOTHO MAINA & ANOTHER (2016) eKLR**, where the honourable court observed as hereunder;

*“The principle of survivorship also known as jus accrescendi operates as was explained in the case of Isabel Chelangat vs Samuel Tiro (2012) eKLR, as follows:*

*“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescent) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence.”.*

36. From the foregoing position, it is apparent that upon the death of Anthony Muchiri Kariuki, (now deceased) the suit property devolved to and/or in favor of the Plaintiff/Applicant and consequently, the Plaintiff/Applicant herein becomes the apparent owner of the suit property.

37. On this account, the plaintiff/Applicant therefore accrues and becomes entitled to the rights that flow from ownership of the suit property, in accordance with the provision of **Sections 24 and 25 of the Land Registration Act, 2012.**

38. As the apparent owner of the suit property, it is my finding and holding that the Plaintiff/Applicant has superior right to and in respect to the suit property, against the Defendant/Respondent.

39. Consequently, where such rights and in particular possession and use, are under threat, like in the manner adverted to in the supporting affidavit and particularly, where the Defendant/respondent is seeking to throw out the Plaintiff/Applicant from own property, Prima facie case, ensues and thus I come to the conclusion that the Plaintiff/Applicant has satisfied this threshold.

### **ISSUE NUMBER 3**

#### **Whether the Plaintiff/Applicant shall suffer irreparable loss in the event the injunction is not granted.**

40. It is agreed that the Plaintiff/Applicant, is the one who is currently in occupation and/or possession of the suit property. However, the Defendant/Respondent contends that the Plaintiff/Applicant took possession and/or assume occupation thereof, by force and thus her conduct is contrary to the Doctrines of Equity.

41. The manner in which the Plaintiff/Applicant took possession of the suit property aside, the concession is, it is the Plaintiff/Applicant, the widow of the deceased, who is now the one occupying the premises. In any event, I have since found and held, that pursuant to the right of survivorship, the suit property has since devolved to the plaintiff/Applicant.

42. Given that the Plaintiff/Applicant is in possession and occupation of the suit property, what is bound to happen, is that in the event there be no orders of Injunction issued, same will be no doubt, be thrown out of the suit property, which by law belongs to her.

43. The aftermath of such kind of an action, will certainly render the Plaintiff/Applicant homeless (read houseless). In this regard, the Plaintiff/Applicant shall be subjected to mental anguish and torture, which is incapable of compensation in monetary terms, and in my humble view, such a loss is indeed Irreparable. Put another way, no amount of money will suffice to compensate the Plaintiff/ Applicant, if same is evicted from the suit property, which has since devolved unto her, during the pendency of this case.

44. To fortify the foregoing finding and holding, I adopt the decision in the court of appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the honourable court defined the meaning and tenor of what constitutes the irreparable loss.

45. Suffice it to say, that to evict the apparent owner from own property, like in the subject matter, shall on the face of it amount to cruelty and thus a violation of the Plaintiff/Applicants Rights under **Article 28 of the Constitution of Kenya, 2010**. For clarity, no scheme can be applied to discern and/or quantify the loss suffered or to be suffered in this respect.

#### **ISSUE NUMBER 4**

##### **In whose favor does the balance of convenient tilt.**

46. I have since found and held by dint of survivorship, the Plaintiff/Applicant herein has accrued title to and/or in respect to the suit property. In this regard, the Plaintiff/Applicant's rights are absolute to the exclusion to all and sundry, the Defendant/Respondent, not excepted.

47. On the other hand, I have similarly found and held that the Plaintiff/Applicant, is the one who is currently in possession and/or occupation of the suit property.

48. Suffice it to say, that the possession and/or occupation is premised on the fact that the plaintiff/Applicant is the first in line, as far as the ownership of the suit property is concerned.

49. In view of the foregoing, it is my finding and holding that the balance of convenience, as well, tilts to and/or in favor of the Plaintiff/Applicant, as against the Defendant/Respondent, even though the later is the mother of the deceased.

50. Based on the fact that the Plaintiff/Applicant has legitimate rights to and in respect of the suit property and based on my findings as pertains to the balance of convenience, it would be tantamount to evicting the Plaintiff/Applicant from the suit property, if the honourable court were to fail to grant the orders sought.

51. Nevertheless, the importance of the rights of the owner cannot gainsaid and in this regard, I fortify this position by adopting the holding of the Court of Appeal in the case of **GEORGE ORAGO ORANGO V GEORGE LIEWA JAGALO & 3 OTHERS (2010) eKLR**, where the court observed as hereunder;

*“The denial of injunction has the effect of dispossessing the appellant of his land. The purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property”.*

#### **CONCLUSION**

52. By virtue of being the apparent owner of the suit property, based and/or anchored on the right of Survivorship, the Plaintiff/Applicant is entitled to protection, failure of which the proprietary rights, which inhere in the Plaintiff/Applicant shall be negated.

53. At any rate, it must also be remembered that it is a serious thing to restrain or (read evict) a registered proprietor from the use of own property and such an action shall, in my humble view, work Injustice against the Plaintiff/Applicant.

#### **DISPOSITION**

54. Having reviewed the issues at play and taking into account the principles and Doctrines of the law, and taking into account the established conditions, which must be proven before grant of orders of temporary injunction, I must say that the application herein is for granting.

55. In a nutshell, the Notice of motion application dated the **2<sup>nd</sup> March 2021**, is hereby allowed in terms of prayer 3 thereof.

56. As pertains to costs, it is worthy to note that the Dispute herein pits a Daughter in law as against a Mother in law. Consequently and in this regard, the order that commends itself, is that Each Party shall bear their own costs of the Application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the presence of: