THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 1 OF 2021 (OS)

JOSEPHAT THUO GITHACHURI.....APPLICANT/PLAINTIFF

=VERSUS=

JAMES GAITHO KIBUE.....1ST DEFENDANT

KIMANI KIBUE.....2ND DEFENDANT

GLADYS NDUTA MBUGUA.....INTERESTED PARTY

RULING

1. The late George Mbugua Kibue *alias* George Mbugua Kabue *alias* Mbugua Kibui [hereinafter referred to as **Mbugua Kibui**] is one of the three registered proprietors of **Land Parcel Number Dagoretti/Ruthimitu/263**, measuring 8.4 acres [**the suit property**]. His two co-registered proprietors are James Gaitho and Kimani Kibui. The three were siblings. They inherited the suit property from their father, Kibui Gaitho in or about 1982.

2. Mbugua Kibui died on 14/10/1995. On 10/12/1999, the plaintiff, Joseph Thuo Githachuri, took out an originating summons dated 9/12/1999 against the two surviving proprietors [James Gaitho and Kimani Kibui], seeking title to one acre out of the suit property, under the doctrine of adverse possession. Rawal J (as she then was) heard the suit ex-parte and on 5/10/2007, she rendered a judgment in which she granted the plaintiff the one acre under the doctrine of adverse possession.

3. In 2013, Gladys Nduta Mbugua [Widow of Mbugua Kibui] filed in the Senior Principal Magistrate Court at Kikuyu a petition for grant of letters of administration relating to the estate of Mbugua Kibui. On 30/9/2013, she was issued with a grant of letters of administration relating to the estate of Mbugua Kibui. Subsequently, on 14/2/2019, Gladys Nduta Mbugua [**the applicant**] brought a notice of motion dated 14/2/2019 on behalf of the estate of Mbugua Kibui, seeking to be joined as a party to this suit. She further sought an order setting aside the judgment rendered by Rawal J on 5/10/2007. The said application is the subject of this ruling.

4. The application was premised on the grounds set out on its face and supported by the applicant's supporting affidavit sworn on 14/2/2019 and her supplementary affidavit sworn on 18/4/2019. She deposed that she was the administrator of the estate of Mbugua Kibui who died on 14/10/1995 and who was one of the three registered proprietors of the suit property. She added that the suit property was inherited by the deceased together with his two siblings from their late father, Kibui Gaitho. The land was registered in the names of the three siblings on 26/10/1982 through transmission and a title was issued to them under the Registered Land Act. She further deposed that each of the three beneficiaries occupied distinct portions of the land where they proceeded to put up houses where they have continuously lived and dwelt with their respective families. She added that each family had exclusive ownership of their respective portions of the land.

5. She further deposed that the parcel register did not indicate that the proprietorship of the suit property was a joint tenancy/joint proprietorship. She stated that because Mbugua Kibui was one of the registered proprietors and her family lived on the suit proper, his estate was entitled to be made a party to this suit from the start. She faulted the plaintiff for failing to join the estate of Mbugua Kibui as a party to this suit; for deliberately misleading the court; and for obtaining judgment against the estate of Mbugua Kibui without joining it as a party to the suit. She added that where joint tenancy has not been explicitly indicated, it should be presumed only in the clearest of circumstances. She urged the court to grant the application.

6. The plaintiff opposed the application through his replying affidavit sworn on 8/4/2019. He deposed that he filed this suit on 14/12/1999, which date was after the death of Mbugua Kibui. He added that Mbugua Kibui's interest in the suit property was extinguished upon his death on 14/10/1995 by virtue of the right of survivorship (*jus accrescend*) hence the rightful owners of the suit property from 1995 were the two original defendants whom he sued, James Gaitho Kabue and Kimani Kibue. He further deposed that a joint tenancy could not devolve under will or intestacy as long as there was a surviving joint tenant because the right of survivorship took precedence. He maintained that the interest of Mbugua Kibui in the suit property was vested in the original two defendants as the surviving joint tenants.

7. The defendant added that he made full disclosure to the court by disclosing in the affidavit supporting the originating summons that there

were three registered proprietors and one of them, Mbugua Kibui, was deceased. He maintained the judgment in this suit was properly obtained and should not be set aside.

8. The two defendants, James Gaitho Kibue and Kimani Kibue, did not participate in the application. The 1st defendant, James Gaitho Kibue is said to have died in 2004 before the *exparte* hearing that culminated in the impugned judgment. There is no record of any substitution relating to the deceased defendant. Neither the applicant nor the plaintiff raised nor addressed the court on the issue of substitution of James Gaitho Kibue.

9. The application was canvassed through written submissions dated 24/9/2019, filed by the firm of **Mwangi Wahome & Co Advocates**. The applicant submitted under the following heads: (i) Joinder of the applicant to the suit; (ii) Setting aside Judgment; (iii) Joint ownership *vis-a-viz* ownership in common; and (iv) Right to be heard.

10. On joinder of the applicant to this suit, counsel cited the provisions of **Order 1 rule 10 (2)** of the **Civil Procedure Rules** and submitted that because Mbugua Kibui was one of the registered proprietors of the suit property, his estate was a necessary party and ought to have been joined as a party to the suit, for the effectual and complete adjudication of the dispute. Citing the decision in **Brek Sulum Hemed v Constituency development Fund Board & Another [2014]eKLR** , counsel argued that the applicant was a party affected by the exparte judgment and the resultant decree.

11. On setting aside judgment, counsel cited the decisions in **Shah v Mbogo [1967] EA 93** and **Ivita v Kyumbu [1984]KLR 441** and submitted that the court had discretionary jurisdiction to set aside the judgment. Counsel further cited the decision in **James Kanyiita Nderitu & another v Marious Philotas Ghikas & another [2016]eKLR** and submitted that because there was no service on the estate of Mbugua Kibui, the judgment herein ought to be set aside.

12. On joint ownership vis-à-vis ownership-in-common, counsel cited the decisions in **Isabel Chelangat v Samuel Tiro Rotich & 5 others [2021] eKLR** and **Moses Bii v Kericho District Land Registrar & Another[2015] eKLR** and argued that where the parcel register did not explicitly specify whether the land was owned jointly or in common, the general legal position was that the land was held in common. Counsel contended that because: the suit property was inherited by the three siblings from their late father, Kibui Gaitho; the land was registered in the names of the three siblings through transmission; and each of the three beneficiaries occupied distinct areas where they had built dwelling homes where they lived with their respective families, it was evident that the registration of the three siblings was intended to be a tenancy- in-common/proprietorship in common.

13. On the right to be heard, counsel cited the decision in **Kanyiita Nderitu & another v Marious Philotas Ghikas & another [2016] eKLR** in which the Court of Appeal emphasized that the right to be heard before any adverse decision is taken against a person was fundamental and permeated Kenya's entire justice system. Counsel urged the court to grant the application.

14. The plaintiff filed written submissions dated 23/9/2019 through the firm of *Muchoki Kangata Njenga & Co Advocates*. Counsel for the plaintiff submitted that the issue falling for determination in the application was whether the intended interested party (the applicant) could be joined in the originating summons and have the judgment rendered on 5/10/2007 set aside. Counsel argued that the answer to the above question was a resounding no because the suit property was jointly owned and at the time of instituting this suit in 1999, Mbugua Kibui had passed on in the year 19995 and his interest in the suit property was accordingly extinguished by virtue of operation of the law. Counsel contended that, in the circumstances, the plaintiff could not join the estate of the deceased as a party to the suit. He added that the plaintiff made full disclosure in the affidavit supporting the originating summons and the court was alive to this fact at the time of rendering its judgment.

15. Citing the provisions of **Sections 101(1), 102(1)** and **103 (1)** of the **Registered Land Act** [now repealed], counsel submitted that a joint tenancy arose whenever land was conveyed or devised to two or more persons without any word to show that they were to take distinct and separate shares. It was the position of counsel for the plaintiff that the court must have taken judicial notice of the above fact when it passed the impugned judgment.

16. Outlining the **"four unities"** that constitute the key elements of a joint tenancy, counsel submitted that the principle of survivorship operated to remove jointly owned property from the law of succession upon the death of one of the joint tenants, hence the applicant had no right to claim an interest in the suit property. Counsel urged the court to dismiss the application.

17. I have considered the application; the response thereto; the parties' respective submissions; the applicable legal frameworks; and the relevant prevailing jurisprudence on the key issues in the application. The following are the two key issues that fall for determination in this application: (i) Whether the estate of the late Mbugua Kibui was a necessary party to the originating summons herein; and (ii) Whether the applicant, on behalf of the said estate, has satisfied the criteria upon which our courts exercise jurisdiction to grant an order of joinder and an order setting aside a judgment entered in the absence of the applicant. I will analyse the two issues in the order in which they are itemized.

18. The first issue is whether the estate of the late Mbugua Kibui was a necessary party to the originating summons. The position of the applicant is that the said estate was a necessary party because Mbugua Kibui was one of the registered proprietors of the suit property. The applicant further contends that the estate of Mbugua Kibui has been adversely affected by the proceedings, judgment, and decree that were procured in its absence yet Mbugua Kibui was one of the registered proprietors of the suit property. The position of the plaintiff/decree holder is that by the time he brought this suit, Mbugua Kibui's interest in the suit property had been extinguished by dint of the principle of survivorship under joint tenancy [*jus accrescend*], hence the estate was not a necessary party.

19. I have looked at the parcel register relating to the suit property. I have also looked at the exhibited title and official search. The suit property was registered under the repealed Registered Land Act. This suit was instituted when the said statute was still in force. The impugned proceedings and judgment were procured when the said statute was still in force. Consequently, the relevant framework in the

repealed Registered Land Act [the repealed Act] is the law to guide the court in determining the above issue. The relevant framework is found in **Sections 101 (1), 102** and **103** of the repealed Act which provided as follows:

> ***101. (1) An instrument made in favour of two or more***
>
> ***persons, and the registration giving effect to it, shall show -***
>
> > ***(a) Whether such persons are joint proprietors or proprietors in common; and***
> >
> > ***(b) Where they are proprietors in common, the share of each proprietor…..***
>
> ***102.(1) Where the land, lease or charge is owned jointly,***
>
> ***no proprietor is entitled to any separate share in***
>
> ***the land, and consequently-***
>
> > ***a) dispositions may be made only by all the***
> >
> > ***joint proprietors; and***
> >
> > ***b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.***
>
> ***(2) For avoidance of doubt, it is hereby declared***
>
> ***that-***
>
> > ***a) the sole proprietor of any land, lease or charge may transfer the same to himself and another person jointly; and***
> >
> > ***b) a joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.***
> >
> > ***c) a joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.***
>
> ***(3) Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common and by filing the instrument.***
>
> ***103. (1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.***
>
> ***(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.***

20. It is clear from **Section 101(1)** of the repealed Act that where an instrument of conveyance was made in favour of two or more persons, both the instruments and the resultant registration were required to specify whether the two or more persons were joint proprietors or proprietors-in-common. Where they were proprietors-in-common, the instrument and the resultant registration (parcel register) were required to show the share of each proprietor.

21. The transmission (succession) instruments that were used to convey the suit property from the late Kibui Gaitho to his three sons was not exhibited by the parties to this suit. The parcel register did not specify whether the three siblings were registered as joint proprietors (joint tenants) or proprietors in common (tenants- in-common). The repealed Act did not have a default framework spelling out the presumption that was to be made in the event of failure to specify whether the proprietorship was joint or in common. The present **Land Registration Act** has cured the above lacuna in the repealed Act by making the following provisions in **Section 91(2):**

> ***91(2) 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.***

22. What is the prevailing jurisprudence on the failure to specify the nature of interest of the co - proprietors prior to the enactment of the current framework in the Land Registration Act? Third tier superior courts [the Environment and Land Court and the High Court] have made conflicting pronouncements on the presumption that was to be made in the absence of a clear specification of the nature of interest of co-proprietors. In ***In Re Estate Dorica Lumire Mapesa [Deceased] [2018 eKLR*** Musyoka J of the High Court stated as follows:

"The register in respect of East Wanga/Lubiru/66 did not indicate whether the proprietorship was joint or in common. However, going by what is stated in Chesire & Modern Law of Real Property cited above, that a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares, I would hold that the deceased and Silas Okumu Simeyo held East Wanga/Libiru/66 as joint proprietors. That is to say that a presumption would arise that the tenancy intended to be joint. I held similarly in re-estate of Josephin Mumbua Mehlaff – Deceased (2015) eKLR"

23. In **Moses Bii v Kericho District Land Registrar & another [2015] eKLR** Munyao J of the Environment and Land Court rendered himself on this issue as follows:

" In our case, as I stated before, the register does not show whether the proprietorship was joint or in common. I also mentioned that the RLA did not contemplate a scenario where the register does not indicate whether land is held jointly or in common, and did not provide for the course to follow, where there are several proprietors but no indication as to whether they hold the land jointly or in common. What then should happen in such a situation?

My view is that if the register does not reflect whether land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship, where the same has not been explicitly indicated, should only be presumed in the clearest of circumstances, where there can be no shred of doubt that the contemplation of the parties was to have the property held jointly. I for myself cannot think of such a state of affairs other than where the proprietors are spouses, though I cannot rule out other situations, but they really must be so clear as to obviate debate on it"

24. A five judge bench of the Court of Appeal was similarly confronted with the above question in **Mukazitoni Josephine v Attorney Genral** ***Republic of Kenya [2015] eKLR.*** The five judge bench of the Court of Appeal pronounced itself on the question as follows:

"34.We have considered the appellant's contention and the learned judge's finding. The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.

35. 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 totem tenet et nihit tenet, a joint tenant holds everything and nothing (see Re Foley (deceased) Public Trustee -v- Foley & Another (1955) NZLR 702). In Stack -v- Dowden (2007) UKHL 17, the House of Lords expressed itself as follows: "The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence."

25. The appeal leading to the above pronouncement by the Court of Appeal arose from a dispute that was determined by the High Court prior to the enactment of **Section 91 (2) of the Land Registration Act.** I have not come across any subsequent pronouncement to the contrary by the Court of Appeal on the same issue. The pronouncement by the Court of Appeal is, in the circumstances, the prevailing jurispendence on the issue under consideration.

26. What emerges from the above pronouncement by the Court of Appeal therefore is that prior to the enactment of **Section 91 (2) of the Land Registration Act,** whenever land was registered in two or more names, in the absence of a clear indication in the register specifying the nature of the interest of the registered co-proprietors, the property was deemed to be held in joint tenancy (joint proprietorship) and not tenancy-in-common (proprietorship-in-common). Put differently, prior to the enactment of **Section 91(2)** of the Land Registration Act, in the absence of a clear indication of the type of proprietorship in the register relating to land registered in the names of two or more persons, the presumption was that the co-proprietors held the land as joint tenants (joint proprietors). Secondly, the above presumption was rebuttable. Thirdly, the onus of rebutting the presumption was on the party seeking to have the court believe otherwise. I will now turn to two auxillary questions which are central to the disposal of the first key issue in this application.

27. The first question is whether the estate of the late Mbugua Kibui had the opportunity to rebut the above presumption at the time the impugned judgment was rendered. The second question is whether, at this point, the estate of Mbugua Kibui has presented evidence rebutting the above presumption.

28. The plaintiff proceeded to initiate this suit and procure the impugned judgment on the basis that the interest of Mbugua Kibui had been extinguished by his death in 1995. Consequently, no step was taken to accord the estate of Mbugua Kibui the opportunity to rebut the presumption that the three siblings did not hold the suit property as joint proprietors but as proprietors-in-common. Secondly, there is no evidence that the estate of Mbugua Kibui was aware of the proceedings that took place before Rawal J. Similarly, there is no evidence that the estate of Mbugua Kibui was aware of the judgment and the decree herein prior to 2019. The conclusion I make from the foregoing is that the estate of Mbugua Kibui did not have the opportunity to rebut the above presumption at the time the impugned proceedings and judgment were procured.

29. On whether the estate of Mbugua Kibui has presented evidence rebutting the presumption that the suit property was held by the three

proprietors as joint proprietors, the court is of the view that the estate has rebutted that presumption. At paragraphs 3 and 4 of the applicant's supplementary affidavit sworn on 18/4/2019, the applicant deposed that the suit property was inherited from her late father-in-law (father to the three registered proprietors), Kibui Gaitho. She added that the suit property was registered in the names of the three sons on 26/10/1982 through transmission. She further deposed that each of the three beneficiaries occupied distinct portions of the land where they put up dwelling houses and where they have been living with their respective families. Lastly, she deposed that each family of the three siblings has exclusive ownership of their respective portions of the land.

30. The above evidence was not controverted by the plaintiff. It does therefore emerge from the above uncontroverted evidence that some of the four unities which are the key features of joint tenancy (joint proprietorship) are broken or are not present in the circumstances of the ownership of the suit property. The features which are present are those of a tenancy-in-common (proprietorship-in-common). It is therefore my finding that the applicant has rebutted the general presumption that proprietorship of the suit property was joint proprietorship and has demonstrated that the three registered proprietors were proprietors - in - common (tenants – in - common).

31. Consequently, it is my finding that the estate of the late Mbugua Kibui was a necessary party to the originating summons herein. I now turn to the second issue in the application.

32. The second issue is whether the applicant, on behalf of the estate of Mbugua Kibui, has satisfied the criteria upon which our courts exercise jurisdiction to grant an order of joinder and an order setting aside judgment entered in the absence of the applicant. **Order 1 rule 10(2)** of the Civil Procedure Rules provides the framework within which the above jurisdiction is exercised. The above framework empowers the court, at any stage of the proceedings, upon an application by either party or *suo motto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party to the suit. Our courts have emphasized on liberal interpretation of the above framework and there is a myriad of decisions by the Court of Appeal that the jurisdiction is properly exercisable post-judgment [see ***(1) JMK v MWM & another [2015] eKLR; (2) James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR; and (3) Alton Homes Limited & another v Davis Nathan Chelogoi & 5 others [2020] eKLR.***

33. The one principle that cuts across the above decisions is that the right of a party to be heard before a judgment affecting him or his property is entered is sacrosanct in our civil procedure rules. The Court of Appeal emphasized this principle in the ***James Kanyiita case*** [*supra*] by adopting the following words of the Supreme Court of India in ***Sangram Singh v Election Tribunal, Koteh Air 1955 SC 664 at 711;-***

> ***"There must be ever present to the mind the fact that our laws of procedure are grounded on a principal of natural justice which requires that men should not be condemned unheard, that decision should not be reached behind their backs that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."***

34. Suffice it to say that where a party satisfies the court that he is confronted with a judgment that has been procured in breach of the above principle, our courts have not hesitated to set aside the judgment.

35. In the present application, the applicant has demonstrated that the late Mbugua Kibui was one of the three registered proprietors of the suit property. She has, through uncontroverted evidence, rebutted the presumption that the three registered proprietors held the suit property as joint proprietors. She has demonstrated that the estate of the late Mbugua Kibui was a necessary party to this suit but was not made a party and was not aware of the impugned proceedings and judgment until 2019. She wants the estate to be made a party to the suit and the judgment entered in the absence of the estate set aside.

36. The Court record shows that the impugned judgment has not been fully enforced. Enforcement proceedings are pending before court. The suit property is still registered in the names of the three sons of Kibui Gaitho.

37. In light of the above evidence, facts and principles, it is my view and finding that the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant an order of joinder and set aside a judgment entered in the absence of a party.

38. The net result is that the application dated 14/2/2019 is granted in the following terms;

> ***(a) Gladys Nduta Mbugua is hereby made a party to this***
>
> ***suit in her capacity as the administrator of the estate of***
>
> ***George Mbugua Kibue alias George Mbugua Kabue***
>
> ***alias Mbugua Kibui.***
>
> ***(b) The Judgment entered in this suit on 5/10/2007 in the absence of the said estate is hereby set aside.***
>
> ***(c) The said administrator shall be served with the originating summons and shall file a response thereto within 14 days of service.***
>
> ***(d) This file shall be returned to Milimani and mentioned before the Deputy Registrar on a date to be fixed at the time of rendering this ruling, for the purpose of listing the matter before the relevant Judge at Milimani ELC.***

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF SEPTEMBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Muhuni for the Plaintiff

Ms Gachugu holding brief for Mr Ambani for the Applicant

Court Assistant: Phyllis Mwangi

NOTE:

This application was heard and a ruling date fixed while I was serving at Nairobi (Milimani) Environment and Land Court Station. Due to the subsequent transfer, I have delivered the ruling virtually at Thika Environment and Land Court Station.

B M EBOSO

JUDGE