



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC 016 OF 2021

IN THE MATTER OF FAILING TO EXECUTE DOCUMENTS

FOR SEPARATION OF TITLE IN RESPECT

L.R. 209/1222/5

JOGINDER SINGH KALSI.....1ST APPLICANT

SURJIT KAUR SYEAN.....2ND APPLICANT

=VERSUS=

GURMIT KAUR KALSI (*Sued personal and as the administrator of the*

***Estate of* MOHAN SINGH KALSI.....RESPONDENT**

JUDGMENT

1. The Applicant instituted this suit vide an originating summons dated 13/01/2021 and sought orders that:-

1. The Honorable Court do issue Orders directing the Land Registrar Nairobi to issue separate titles/subleases in respect of property known as L.R. 209/1222/5 Nairobi.

2. The Respondent (or her legal representatives be compelled to execute the necessary documents for the separation of the titles/subleases

3. In the alternative The Deputy Registrar of the Environment and Land Court (Milimani courts) be authorized to execute documents necessary for the separation of title/lease on behalf of the Respondent.

4. The cost to be in the cause.

2. The summons is premised on grounds outlined in the application and supported by an affidavit sworn by the Applicant Mr. Joginder Singh Kalsi. He deponed that the deceased Mohan Singh Kalsi (hereinafter referred to as "the Deceased").

3. The Applicant referred the Court to an annexed copy of title of L.R. No. 209/1222/5 which was from 1/04/1997 registered to his mother, his two brothers and himself as tenants in common in equal shares. The Tenants in common were; Karam Kaur Kalsi, Mohan Singh Kalsi and the 1st Applicant, Joginder Singh Kalsi. Further, that Karam Kaur Kalsi then bequeathed her share in the property to Surjit Kaur Seyan the 2nd Applicant herein via a Will dated 5/11/1999.

4. The 1st Applicant has since purchased the Respondent's portion of 25% and therefore they now own 50% of the said property with the 2nd Applicant, Surjit Kaur Seyan and the Respondent each owning 25% of the property.

5. Upon the death of Mohan Singh Kalsi the Letters of Administration of the deceased's estate were issued to Gurmit Kaur Kalsi the Respondent. The title of the suit property however is still registered in the name of the all the 3 tenants in common to this date. The Applicant urged the Court to determine the summons to enable the separation of titles/subleases to enable each party deal with their share of the property as they desire. The Applicants state they have written and even held discussions with the Respondent on several occasions seeking the execution of the necessary documents for the separation of the title or leases but the Respondent has been unresponsive.

6. The 2nd Applicant filed An Affidavit he swore on 22/07/2020 wherein they averred that the subject parcel LR 209/1222/5 was from 1/04/1997 registered to her mother and her three brothers as tenants in common in equal shares namely Karam Kaur Kalsi, Joginder Singh Kalsi, Mohan Singh and Gurmeet Singh Kalsi. That Karam Kaur Kalsi then bequeathed her share in the property to the 2nd Applicant via a will dated 5/11/1999 and a Certificate of Confirmation dated 22/09/2003. Therefore the 2nd Applicant is therefore a 25% owner of the subject property while the Respondent owns 25% and the 1st Applicant owns 50% having purchased 25% of the subject property belonging to the other tenant in common Gurmeet Singh Kalsi.

7. The title is still registered in the names of the 3 tenants in common to this date. The Respondent has been approached on several occasions to execute the necessary documents of the separation of the title or lease to no avail. Therefore, the right of the 2nd Applicant as the owner of the property has been curtailed by the failure of the Respondent to execute the documents to separate the title or lease. She attached a copy of the title, copy of the Certificate of Confirmation of grant and the Will. She also attached a copy of correspondence to the Respondent.

8. Despite service having been effected upon the Respondent through registered post she failed to enter appearance and/or file a reply to the Applicant's Originating Summons.

The Issues and Determination

9. The Applicant sought judgment based on the affidavits filed. Arising from the pleadings filed, this Court finds that the issues that are before the Court for determination are as follows:-

1. Whether the Court can sever the tenancy in common in respect of L.R. No.209/1222/5.

2. Whether the Applicants are entitled to the reliefs sought.

Whether the Court can sever the tenancy in common in respect of L.R. No.209/1222/5

10. This Court notes that the key features of a tenancy in common are that each tenant has a distinct share in the common property which has not yet been divided among the co-owners, and there is no right of survivorship as among the co-owners.

11. It is also noted by the Court that the law on the termination of a tenancy in common allows co-owners to sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of the sale as shown in the decision in *Shantaben Ramniklal Parmar & Another vs Beatrice Waruguru Gitutu, (2007) e KLR*. It is also provided in Halsbury's Laws of England, Fourth Edition (Reissue) Volume 39(2) at paragraphs 214-215 as follows in this regard:

*"214. **Determination of union of interests in one person.** A tenancy in common may be determined by the union of the various interests, whether by acquisition inter vivos or by testamentary disposition, in the same person, who therefore holds the entirety of the land.*

*215. **Determination by partition.** A tenancy in common may be determined by partition. The legal term 'partition' is applied to the division of land, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."*

12. Sections 94 and 96 of the Land Registration Act also now provides for a severance of a common tenancy by way of partition or sale of the land. As regard partition, the procedure is provided for under section 94 as follows:

(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.

13. The section provides the factors that a Registrar needs to consider including the respective shares of the common tenants and that he or she may make the order for partition subject to such limitations and conditions, including conditions relating to the payment of compensation to those tenants in common who have not agreed to the partition by the tenants in common who have applied for the partition, and how the expenses and costs of the partition are to be borne.

14. Under section 96 of the Land Registration Act, 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.

15. It is therefore the case that as the Applicant in this suit is not asking for sale of the suit property, the alternative that is available to him under the law is that of partition, and he is required to follow the procedure laid down in section 94 of the Land Registration Act in this regard. Under the section the power to partition land held under common tenancy is given to the Registrars appointed under section 12 and 13 of the Land Registration Act, and this Court therefore finds that it cannot grant the order sought of severing the common tenancy in respect of L.R. No. 209/1222/5 as the procedure provided by law has not been followed.

Whether the Applicants are entitled to the reliefs sought

16. The Respondent failed to enter appearance and thereby defend the suit. The fact that the suit has not been defended means that the Applicants' evidence remained unchallenged and uncontroverted. However, the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Applicants are still required to prove their case on the required standard of balance of probabilities. See the case of *Shaneebal Limited...Vs...County Government of Machakos [supra]*, where the Court cited the case of *Karuru Munyoro...vs Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988*, where the Court held that: -

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant’s and or their Counsel to cross examine her on evidence, the Plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”.

17. The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case as the Plaintiff has the duty to discharge the burden of proof. See the case of *Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR*, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

18. Further the case of *Gichinga Kibutha...Vs...Carooline Nduku (2018) eKLR*, where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

19. The Applicants' have sought for the order of this Court to sever the ownership among the tenants in common including the Respondent. It is the Applicants' contention that they own in common the suit property with their brothers, sister and that together with the Respondent, they are the registered owners of the suit property. That though each one of them is in occupation of their separate share they hold the title as tenants in common and that the Respondent has refused to sign documents to sever their ownership.

20. It is clear from the documents presented that the suit property is owned in common, as each party has their own share of the property though undivided. From the provisions of the Land Registration Act, the key features of a tenancy in common are that each tenant has a distinct share in the common property which has not yet been divided among the co-owners.

21. The Applicants have sought for severing of the property before this Court. However, the Court finds that it does not have jurisdiction to deal with the said issue as the law on the termination of a tenancy in common allows the co-owner to seer ownership by either acquiring the other person's interest, by sale and division of the proceeds or by petitioning the Land Registrar to partition the property so that each tenant is able to get their part of the share This is as per the provisions of **Sections 94 of the Land Registration Act** which provides for a severance of a common tenancy by way of partition.:

(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.

22. Further see the case *Muhuri Muchiri ...vs... Hannah Nyamunya (Sued as the Administrator of the Estate of Njenga Muchiri also*

Known as *Samuel Njenga Muchiri (Deceased) [2015] eKLR* where the Court held that:-

“co-owners to by agreement to sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of the sale....”

23. Under section 96 of the **Land Registration Act**, 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.”

24. It is thus clear that the Applicants from their pleadings are asking the Court to order that the Respondent sign transfer documents. Therefore, it is not in doubt as the Court has provided the procedure through which the same can be accomplished by way of partition. Consequently, the Applicants herein are thus required to follow the laid down procedure as per the provisions of **section 94 of the Land Registration Act** in this regard.

25. Under the section 94 the power to partition land held under **common tenancy** is given to the Registrars appointed under **section 12 and 13 of the Land Registration Act**, for the above reasons, this Court therefore finds that it cannot grant the order sought of severing the common tenancy as there is a procedure set down in law. See the Case of *Paul Muraya Kaguri ...Vs... Simon Mbaria Muchunu [2015] eKLR* where the Court held that;

“It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.”

26. Having carefully considered the available evidence and the available provisions of law, the Court finds and holds that the Applicants are not entitled to the orders sought.

27. Arising from the findings in the foregoing, the orders sought by the Applicants in their Originating Summons cannot be granted by this Court. On the issue of costs, each party shall bear their own costs of the suit since the Applicants have not succeeded in their claim and given that there was no participation in these proceedings by the Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2021.

.....

MOGENI J

JUDGE

In the presence of

Ms. Koki for the **1st and 2nd Applicants**

N/A for the Respondent

Vincent Owuor Court Assistant